

DEC 28 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

No.

77-926**GERALDINE G. CANNON,**

v.

Petitioner,

THE UNIVERSITY OF CHICAGO and Leon O. Jacobson,
Dean, Joseph J. Ceithaml, Dean of Students, and the Admis-
sions Committee, of the Pritzker School of Medicine, and
SECRETARY OF HEALTH EDUCATION AND WEL-
FARE, Joseph A. Califano and Region V Director of HEW
Office for Civil Rights, Kenneth A. Mines,

*Respondents.***GERALDINE G. CANNON,**

v.

Petitioner,

NORTHWESTERN UNIVERSITY and James E. Ecken-
hoff, Dean, Charles A. Berry, Dean for Admissions, and the
Admissions Committee, of Northwestern Medical School,
and **SECRETARY OF HEALTH EDUCATION AND**
WELFARE, Joseph A. Califano and Region V Director of
HEW Office for Civil Rights, Kenneth A. Mines,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Geraldine G. Cannon, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above cases.

* Pursuant to Rule 48(3) of this Court, Joseph A. Califano has been substituted for F. David Mathews as Secretary of Health Education and Welfare.

OPINIONS BELOW

The opinion of the court of appeals is reported at 559 F.2d 1063, 45 U.S. Law Week 2149. The opinion on rehearing appears at 559 F.2d 1077, 46 U.S. Law Week 2118. Both are set out in the Appendix. (pp. A-2, A-22).

The memorandum of decision in the district court was reported at 406 F. Supp. 1257.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1976. The opinion on rehearing of the Title IX issue presented for review in this Court was filed on August 9, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 3, 1977 with Chief Judge Fatchild and Judge Swygert voting to rehear the Title IX issue *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether section 901 of Title IX, Public Law 92-318, 20 U.S.C. §1681, which prohibits discrimination on the basis of sex in education programs receiving federal financial assistance, is enforceable in a federal civil action by an individual.

STATUTE AND REGULATION INVOLVED

Section 901, Title IX, Public Law 92-318, 20 U.S.C. §1681:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of . . . professional education, and graduate higher education, and to public institutions of undergraduate higher education"

Section 21(b)(2), Title IX Regulations, 45 C.F.R. §86.21(b)(2):

"A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable."

STATEMENT OF THE CASE

Petitioner applied for admission to the 1975 entering class at each respondent medical school. She is an experienced surgical nurse over 30 years of age who was then completing her baccalaureate degree *cum laude*. Her academic qualifications, including college grade point average and medical college admission test scores, were higher than a substantial portion of the students subsequently admitted by each school.

After denial of her applications, petitioner filed administrative complaints with the Department of Health, Education and Welfare alleging that each school discriminated against women and that her application was denied at the initial screening level under a published admission policy of each school discouraging applicants over 30 years of age which had a disproportionately adverse effect upon women and did not validly predict success in medical school or practice. Administrative action proved to be unavailable in fact.

In the summer of 1975, petitioner commenced these civil actions. She claimed that the composition of the student body at each school reflected discrimination against women generally and requested a declaratory judgment that the particular policy under which her application was denied by each school discriminated on the basis of sex in violation of Title IX and the HEW regulations thereunder. Reevaluation of her applications without regard to said policies and other remedies also were demanded. Alternatively, she sought to compel administrative action by HEW or to have HEW aligned as party plaintiff in her claim, as a third party beneficiary, to enforce contractual assurances against sex discrimination given by each school to HEW in order to obtain federal financial assistance.

The basis for jurisdiction in the district court was that petitioner's claims are based upon federal civil rights law and

that the United States is a party. Although each respondent school acknowledged receipt of federal financial assistance and its obligation not to discriminate on the basis of sex, the complaints were dismissed for failure to state a claim upon which relief could be granted because Title IX does not authorize a private right of action. The cases were consolidated for briefing and argument on appeal. The court of appeals affirmed, holding that Title IX does not permit a private action by an individual. On rehearing, the federal respondents reversed the position previously asserted and supported petitioner's claim that a private right of action should be implied under Title IX.

REASONS FOR GRANTING THE WRIT

1. The court of appeals has decided an important question of women's rights under federal law which has not been, but should be, settled by this Court.

The question of private enforceability of section 901 of Title IX should be settled by this Court, particularly where such question also relates directly to the enforceability of two other federal laws which are worded identically, namely section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination on the ground of race, color or national origin in any program receiving federal financial assistance, and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination solely by reason of a handicap in such programs. Title IX was patterned on Title VI and section 504 in turn was patterned on Title VI and Title IX. These laws differ only in the types of discrimination and programs covered by each.

The importance of the national effort to promote equal opportunities for all persons is clear. The importance of

equal access to education in that effort has been abundantly established. This case presents to the Court, as a matter of first impression, the question of whether the primary federal statute prohibiting sex discrimination in education programs receiving federal financial assistance may be enforced by private parties in the federal courts, at least where the administrative enforcement capability of HEW is inadequate or unavailable.

One reflection of the importance of the court of appeals decision is the parties who supported petitioner. On rehearing, HEW's national Office for Civil Rights and the civil rights division of the Department of Justice reversed the position which had been asserted on behalf of the federal respondents by regional officials and supported petitioner's claim that, in the circumstances of this case, a private right of action should be implied under Title IX. Supporting briefs were submitted as *amici curiae* by Senator Birch E. Bayh, Jr., one of the principal congressional sponsors of Title IX; by the Women's Rights Project of the American Civil Liberties Union and the NOW Legal Defense and Education Fund; and by the National Education Association, the Women's Equity Action League and the National Organization for Women.

Appropriately, the principle embodied in the published policies of the respondent schools here at issue is at the heart of the national effort to eliminate unreasonable sex discrimination. Exclusionary policies which utilize gender or race as express terms have been generally eliminated through federal civil rights enforcement efforts under Title IX and Title VI, respectively. When the relative academic and career patterns of men and women are examined it becomes clear that the respondent schools' admission policies could not be more calculatedly aimed at excluding women without using gender as an express term. Virtually all medical schools have comparable policies as do many other graduate

and professional schools.¹ The effect of such continued sex discrimination by medical schools has been devastating in that now, almost seven years after explicit congressional prohibition of sex discrimination in admissions to medical schools,² even though almost 50% of college graduates and about 85% of the personnel in the health care field are women,³ only about 20% of entering medical students are women.

In her Epilogue to the Tenth Anniversary Edition of "the book that started it all," *THE FEMININE MYSTIQUE*, (W.W. Norton & Co., New York, 1963, 1974) Betty Friedan reported that application of a similar "age" policy by the department of Psychology at Columbia University was the incident which sparked formation of the National Organization for Women. Sociological and statistical support for the significance and importance of petitioner's claim has been well documented. See *e.g.* WALSH, *DOCTORS WANTED, NO*

¹ According to data published by the Association of American Medical Colleges applicants to U.S. medical schools adversely affected by policies discriminating against persons over a specified age, ranging generally from 27 to 30, numbered about 4,000 in 1974 alone. To this must be added otherwise qualified potential applicants who were deterred by the chilling effect of such published policies. Petitioner alleged that such persons are disproportionately female and proffered statistical data to support that claim. The basic explanation is simple. Many women interrupt their education to marry and raise children before completing graduate or professional education. For example, the percentage of students for whom the lapse of time from receipt of a baccalaureate degree to the commencement of graduate study is 10 years or more is 2½ times as great for women as for men. Marriage and children are the reasons most often cited by women for the interruption of education but rarely cited by men.

² Section 799A, Public Health Service Act, 42 U.S.C. § 295h-9. Title IX was enacted the following year.

³ Shelton & Bennett, Sex Discrimination in Vocational Education: Title IX and Other Remedies, 62 *Calif. L. Rev.* 1121 (1974).

WOMEN NEED APPLY, (Yale Univ. Press 1977); HARRIS, THE PRIME OF MS. AMERICA, (G. P. Putnam's Sons, New York, 1975); and ASTIN, THE WOMAN DOCTORATE IN AMERICA, (Russell Sage Foundation, New York 1969).

Following the original decision in the court of appeals, Congress adopted the Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, 42 U.S.C.A. § 1988 (1977 Supp.) which authorizes the award of attorney's fees in any action to enforce specified civil rights laws, including Title VI and Title IX. Virtually every congressman who spoke on the attorney's fees act strongly reflected the understanding that Title VI and Title IX were enforceable in private actions.⁴ That Act confirmed the earlier congressional declaration that Title VI and Title IX "permit a judicial remedy through a private action," made in connection with amendment of the Rehabilitation Act of 1973. 1974 U.S. Code Cong. and Adm. News 6390-91. Such congressional declaration of the

⁴ See: 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16251 report of Sen. H. Scott and S.16252 report of Sen. Kennedy and (daily ed. Oct. 1, 1976) report of Rep. Drinan. See also: 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16262 remarks of Sen. Allen, (daily ed. Sept. 22, 1976) S.16431 remarks of Sen. Hathaway, (daily ed. Sept. 29, 1976) S.17051 remarks of Sen. Tunney, S.17052 remarks of Sen. Abourezk, (daily ed. Oct. 1, 1976) H.12152 *et seq.* colloquy among Reps. Quie, Drinan, Anderson and Bauman, H.12161 remarks of Rep. Railsback, H.12165 remarks of Rep. Sieberling and H.12164 remarks of Rep. Holzman.

The opinion on rehearing concluded that Title IX was specified in the act "merely to provide for the possibility that some court might deem it appropriate in the future to imply a private right of action from the provisions of Title IX." 559 F.2d at 1080 (App. p.A-27) However, that construction presumes inclusion of Title VI and Title IX in the act either invited judicial interpretation contrary to the intent of Congress or is a nullity. At the very least the attorney's fees act demonstrates that a private right of action under Title VI or Title IX would not conflict with congressional intent. Such asserted conflict, however, was the basis for the denial of such a right of action in the decision below.

enforceability of Title VI and Title IX followed this court's statement of the enforceability of Title VI in *Lau v. Nichols*, 414 U.S. 563, 566 (1974). That Congress intended Title IX to be enforceable in the same manner as Title VI is clear beyond question.

The Senate Report on the attorney's fees act stated, "These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation while at the same time limiting the growth of the enforcement bureaucracy." 1976 U.S. Code Cong. and Adm. News 5911. This matter provides an apt illustration. On June 2, 1976, 15 months after filing, the regional office of HEW advised petitioner that her claims present issues "of first impression and national in scope." (App. p. A-35). She has received no further communication on her administrative complaints. While HEW has recognized a responsibility to investigate individual complaints, it is not capable of fully processing each individual complaint with its available staff and funding.⁵

The Title IX regulations, like the Title VI regulations, permit participation by an individual complainant at the discretion of HEW but they do not afford the individual any right to participate. Termination of federal assistance, without more, provides punishment of an offending recipient instead of a remedy to an aggrieved individual. Specific enforcement of contractual assurances against discrimination is a far more appropriate remedy for valid individual complaints. The position of HEW on rehearing, supporting a

⁵ See *Rosado v. Wyman*, 397 U.S. 397 (1970), *Allen v. Board of Education*, 393 U.S. 544, 556 (1969). HEW Secretary Mathews confirmed that "current and projected staff resources will still be inadequate simultaneously to eliminate the complaint backlog, to resolve all incoming complaints on a timely basis, and to fulfill other essential enforcement responsibilities." 41 Fed. Reg. 18394 (1976).

private right of action under Title IX, accords with the long-standing opinion of departmental counsel dated September 17, 1974, a copy of which is set out in the Appendix. (p. A-36).

2. The decision below conflicts with applicable decisions of this Court pertaining to discrimination on the basis of race, color or national origin, and related issues.

This Court should grant certiorari to correct the conflict between the decision below and three decisions of this Court.

First, in *Lau v. Nichols*, 414 U.S. 563 (1974), this Court recognized the enforceability of Title VI as follows:

"We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 [of Title VI] to reverse the Court of Appeals." 414 U.S. at 566.

The decision below distinguished *Lau* with the unprecedented ruling that federal courts may imply jurisdiction under Title VI or Title IX for actions by "large groups" claiming race or sex based discrimination but not for individual actions.⁶ Such distinction however, fails to recognize that a suit for violation of Title VI or Title IX is necessarily in the nature of a class action because the evil sought to be ended is discrimination on the basis of a class characteristic, *i.e.* race, color, national origin or sex, and overlooks the central role of *stare decisis* in our legal system. By so limiting access to the courts, it runs contrary to American tradition that civil rights are basically individual rights.

⁶ 559 F.2d at 1072, 1074 n. 16, 1083. (App. pp. A-12, A-16 n. 16, A-33).

Recently, in *Regents of the University of California v. Bakke*, No. 76-811, this Court *sua sponte* requested supplemental briefs as to the applicability of Title VI to that case. Such action would have little meaning in that suit by an individual if the decision below had correctly distinguished *Lau* as being dependent upon the large number of plaintiffs. Such action by this Court on its own initiative also rejects the alternative distinction asserted in the decision below that *Lau* and other decisions of lower federal courts which involved both constitutional and statutory claims under Title VI, were decided under the Constitution. Exactly the opposite conclusion, namely that such cases were decided under the statute, accords with such action by this Court in *Bakke* and the well established policy of deciding cases on non-constitutional grounds if possible.

Second, the decision below conflicts with the decision of this Court in *Cort v. Ash*, 422 U.S. 66 (1974). That decision articulated four factors pertinent to implying a private cause of action under a federal statute which does not expressly provide such a remedy.

With respect to the most pertinent factor of whether there is an indication of legislative intent to permit or deny such a remedy, *Cort* stated that where federal law has granted a class of persons certain rights, — as do both Title VI and Title IX, by utilizing the language, "No person in the United States shall . . . be deprived of the benefits" — it is not necessary to create a private cause of action although an explicit purpose to deny such a cause of action would be controlling. 422 U.S. at 82. Clearly, no purpose to deny a cause of action is evident in either Title VI or Title IX. Any such purpose would preclude the courts from deciding cases under Title VI or Title IX where federal jurisdiction had been claimed on some other basis such as "state action" under 42 U.S.C. § 1983, because Congress applied the same

policy in the same words to both state and private recipients of federal financial assistance in both statutes.⁷ Yet the court of appeals on rehearing adopted such an alternative distinction for *Lau* and the multitude of other decisions which permitted private actions under Title VI.⁸

The three other factors specified in *Cort* all confirm that a private right of action should be implied: petitioner is within the class for whose *especial* benefit Title IX was enacted; the federal respondents have confirmed that her private action would not conflict with their administrative efforts but instead provide appropriate support; and civil rights have not been traditionally relegated to state law.

Finally, the decision below conflicts with the decision of this court in *Conley v. Gibson*, 355 U.S. 41 (1957) that "a complaint should not be dismissed unless it appears beyond

⁷ While the decision on rehearing was pending, another panel of the Seventh Circuit in *Lloyd v. RTA*, 548 F.2d 1277 (7th Cir. 1977) held that section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, was enforceable against defendants to whom 42 U.S.C. § 1983 did not apply. On rehearing, the court below distinguished *Lloyd* on the ground that Congress provided no remedy at all for section 504, overlooking the finding in *Lloyd* that the legislative history expressly contemplated administrative regulations and enforcement comparable to Title VI and Title IX. Cf. 559 F.2d at 1082 (App. p. A-32) and 548 F.2d at 1281-82 n.15, 1285. The enforcement provisions of the HEW regulations for both Title IX and section 504 are identical. Both simply incorporate by reference the enforcement provisions for Title VI. 45 C.F.R. § 84.61 and 45 C.F.R. § 86.71.

⁸ 559 F.2d at 1083 (App. p. A-33-34). See annotations for Title VI, 42 U.S.C.A. § 2000d *et seq.* Analytically, the distinctions of *Lau* on constitutional and state action grounds are the same because 42 U.S.C. § 1983 by its terms requires violation of civil rights afforded by the Constitution and laws of the United States. If judicial enforcement of Title VI or Title IX would conflict with the intent of Congress, such laws could not trigger the operation of section 1983, thus leaving only the constitutional argument. This Court, however, expressly declined to reach the Equal Protection Clause argument in *Lau* and relied solely on section 601.

doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. Specifically, the court of appeals in conflict with *Conley*:

(i) adopted one respondent school's vague and unproven suggestion that admission of petitioner would require discrimination against better qualified applicants⁹ instead of petitioner's verified allegation, based upon data published by the school, that she had higher academic qualifications than a substantial number of its accepted students;¹⁰

(ii) overlooked petitioner's claim that she is within a large class of women against whom respondents discriminate on the basis of sex;¹¹

(iii) rejected petitioner's claim under 42 U.S.C. § 1983 that in order to obtain state assistance¹² both respondent schools preferred Illinois residents contrary to what school administrators would decide on the basis of academic policy on the ground that facts cited by

⁹ Such suggestion was made only on behalf of the Univ. of Chicago respondents. The Northwestern respondents had acknowledged in writing that their age policy was involved in denial of petitioner's application.

¹⁰ Petitioner estimated that her grade point average at the time of application and medical college admission test scores were higher than at least 25% of the students accepted by the school and that her final grade point average was higher than at least 50% of the accepted students.

¹¹ See footnote 1 above.

¹² Petitioner claimed that each medical school is operated predominately from governmental funds. The Pritzker School of Medicine admitted direct state aid amounting to more than \$9,600 per Illinois student per year. Tuition and fees were less than \$3,300 at that time. Federal financial assistance creating Title IX obligations was acknowledged by both schools but the amount was not disclosed. Federal assistance is subject to state control under the Public Health Service Act. See *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 966-69 (4th Cir. 1963) *cert. denied*, 376 U.S. 938 (1964).

petitioner to evidence such policy "may be" related to other factors¹³; and

(iv) initially held, without explanation, that delay of "about one year" in administrative action by HEW on petitioner's Title IX claim was not unreasonable and, on rehearing, after such delay had exceeded 2½ years and HEW had supported petitioner, claimed that administrative enforcement of Title IX had not been "given an opportunity to work".¹⁴

Thus, the court of appeals decided the important question of women's rights under federal law presented by this petition in conflict with applicable decisions of this court in *Lau*, *Cort* and *Conley*.

By denying to women seeking enforcement of rights secured by Title IX the same procedure afforded by the decision of this Court in *Lau* for rights secured by Title VI, the decision below rejected the substantial legislative history and obvious identity of language that compel similar interpretation. The distinction of *Lau* on the basis of the number of plaintiffs is unprecedented and contrary to American legal tradition. The alternative distinction on state action

¹³ 559 F.2d at 1069n.7. (App. p. A-6n.7). Cf. 559 F.2d at 1072n.9, 1083. (App. pp. A-11n.9, A-33-34). Petitioner's §1983 claims included violation of Equal Protection Clause as well as Title IX.

¹⁴ 559 F.2d at 1077, 1082. (App. pp. A-20, A-32). Lack of prompt outside enforcement by HEW and the courts cannot help but tempt recipients to delay the institution of meaningful internal procedures to resolve claims of discrimination thereby increasing the substantial HEW administrative backlog and creating constitutional litigation for the courts on matters which could be resolved under the statute and regulations as in *Lau*. More importantly, neglect of prompt enforcement, for whatever reason, permits continued federal subsidy of discrimination in defiance of national policy.

and constitutional grounds fails to account for Congress' adoption of the same policy for all specified programs receiving federal financial assistance, state or private, and the pointed reliance by this Court in *Lau* on the statute and the regulations instead of the Equal Protection Clause. The importance of the issue under federal law requires that it be settled by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 27, 1976

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. ROBERT A. GRANT, *Senior District Judge**

No. 76-1238

GERALDINE G. CANNON,
Plaintiff-Appellant,

v.

THE UNIVERSITY OF CHICAGO, et al.,
Defendants-Appellees.

} Appeal from the
United States
District Court
for the Northern
District of Illinois,
Eastern Division

No. 76-1239

GERALDINE G. CANNON,
Plaintiff-Appellant,

v.

NORTHWESTERN UNIVERSITY, et al.,
Defendants-Appellees.

Nos. 75-C-2402, 75-C-2724
JULIUS J. HOFFMAN, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, **AF-FIRMED**, with costs, in accordance with the opinion of this Court filed this date.

* Honorable Robert A. Grant, Senior Judge, United States District Court for the Northern District of Indiana, sitting by designation.

In the
United States Court of Appeals
For the Seventh Circuit

No. 76-1238

GERALDINE G. CANNON,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF CHICAGO, et al.,

Defendant-Appellees.

No. 76-1239

GERALDINE G. CANNON

Plaintiff-Appellant,

v.

NORTHWESTERN UNIVERSITY, et al.,

Defendant-Appellees.

Consolidated appeals from the United States District
 Court for the Northern District of Illinois,
 Eastern Division — Nos. 75 C 2402, 75 C 2724
 JULIUS J. HOFFMAN, *Judge.*

HEARD JUNE 4, 1976 — DECIDED AUGUST 27, 1976

Before SPRECHER, BAUER, *Circuit Judges*, and GRANT,
*Senior District Judge.**

BAUER, *Circuit Judge.* Plaintiff Geraldine Cannon
 brought this civil rights suit against defendants, the Uni-

*The Hon. Robert A. Grant, United States District Court for the
 Northern District of Indiana, is sitting by designation.

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versity of Chicago, Northwestern University, and various individual officers of the schools, after she was rejected as an applicant for admission to the medical schools. She alleges that she was refused on the basis of her age and sex. The trial court dismissed the suit for failing to state a claim upon which relief could be granted. We affirm.

Plaintiff at the time of application was 39 years old with a bachelor's degree from Trinity College of Deerfield, Illinois. Her medical college admission test scores placed her in the lower half of the applicant group. Her undergraduate grade point average in basic science was 3.17 on a 4.00 scale.

Although the plaintiff's academic credentials were good, statistics for the 1975 entering class at the University of Chicago Pritzker School of Medicine indicate the plaintiff faced overwhelming competition; 5,427 persons applied for the 104 positions available at the medical school. In sharp contrast to plaintiff's grades, the overall average of the entering class was 3.70. The Dean of the medical school stated in an affidavit that there were at least 2,000 unsuccessful applicants who had better academic qualifications than the plaintiff.

A review of the persons who applied with plaintiff indicates that 1,172 were women and 4,154 were men. Of the 104 admitted, 19 were female and 85 were male. Over the past four years, 18.1% of the applicants to the University of Chicago Medical School has been female; while over the same period 18.3% of the entering class has been female.¹

Despite the difficult factual setting² in which plaintiff

¹ Although the factual analysis and statistics quoted relate only to the University of Chicago Medical School, the admission practices are similar at Northwestern. The plaintiff also brought an administrative complaint against all the other medical schools in the State of Illinois. Each of them also refused her admission.

² The factual picture presented by comparing the plaintiff's qualifications against the objective standard set by the statistical record of the entering class indicates that it would have been unfair to admit plaintiff to the class ahead of at least the 2,000 other applicants who had better academic records. Of course we realize that the admission committees base their decisions upon other factors in addition to the applicant's academic record, such as past achievement in employment or extracurricular activities. There is no allegation that plaintiff's past employment or extracurricular activity brought extra attention to her application.

found herself she brought suit alleging age and sex discrimination. The complaint alleged that her rights were violated under the Civil Rights Act of 1871, 42 U.S.C. § 1983, Title IX of the Education Amendments to the Civil Rights Act of 1964, which prohibits sex discrimination, the Age Discrimination in Employment Act, 29 U.S.C. § 621, and the Public Health Services Act, 799A, 41 U.S.C. § 295h-9. Plaintiff also filed administrative complaints with the Department of Health, Education and Welfare ("HEW"). Later the complaint was amended naming HEW and its regional director as defendants in the suit.³ In affirming the dismissal of the complaint we will consider each of plaintiff's jurisdictional claims individually.

I. INSUFFICIENT STATE ACTION EXISTS FOR FEDERAL JURISDICTION UNDER 42 U.S.C. § 1983.

Plaintiff's chief allegation is that the defendant's rejection of her application for admission to medical school deprived her of equal protection of the laws in violation of 42 U.S.C. § 1983.⁴ The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction over this claim on the ground that plaintiff had failed to meet the "state action" requirement of § 1983. In so ruling, Judge Hoffman specifically applied the standards for the "state action" requirement which have been articulated in recent years by the United States Supreme Court and by this Court.

³ Plaintiff filed an administrative sex discrimination complaint with HEW upon receiving notice of her rejection for admission to the medical school at the University of Chicago. Later she also filed complaints against Northwestern, Southern Illinois University Medical School, Stritch School of Medicine at Loyola University, and the University of Illinois Medical School. When informed that the investigation of her complaints would be delayed, plaintiff named the regional director and HEW as party defendants in this suit. Presently HEW is still investigating her claim of discrimination.

⁴ 42 U.S.C. § 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

In *Moose Lodge No. 107 v. Irvis*,⁵ 407 U.S. 163, 173 (1972), a black guest was refused service in a private club's dining room because of his race. Since the club was operating pursuant to a liquor license issued by the Pennsylvania Liquor Control Board and was subject to detailed regulations by the Pennsylvania Board, the plaintiff argued that sufficient "state action" was present to establish a violation of his Fourteenth Amendment rights.

The Court rejected the "state action" claim, observing:

"The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in the Civil Rights cases, *supra*, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations', *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition." 407 U.S. at 173.

The requirement of state action was explained even more fully by the Supreme Court in *Jackson v. Metropolitan Edison Comm.*, 419 U.S. 345 (1974). Suit was brought under § 1983 against a private utility company seeking an injunction and damages for the termination of plaintiff's electrical services without notice, a hearing, or an opportunity to pay any amounts due. The claim of state action was based upon the following allegations: (1) the State had conferred monopoly status upon the utility company; (2) the utility performed a public service required to be supplied on a continuous basis under the

⁵ Plaintiff seeks to distinguish *Moose Lodge No. 107 v. Irvis*, *supra*, on the basis that no financial assistance was involved in that case. We note that the use of a liquor license to a private club can be just as important as financial assistance to a private university.

law, hence performing a "public function"; and (3) the state "specifically authorized and approved" the termination practice. In holding that this was insufficient for a finding of state action under § 1983, the Supreme Court outlined the relevant test (419 U.S. at 350-51):

"The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. * * * Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n. v. Polak*, 353 U.S. 451, 462 (1952). It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107, supra*, at 176.

The Supreme Court has thus made clear that neither general government involvement nor even extensive detailed state regulation is sufficient for a finding of state action. Rather, the state must affirmatively support and be directly involved in the specific conduct which is being challenged.⁶

Plaintiff in this case makes an allegation that because the medical school receives money from the state its admission decisions are made differently than school administrators would otherwise decide on the basis of academic policy. We see nothing in the record to support this conclusory allegation.⁷ Plaintiff argues that the

⁶ See, *Washington v. Davis*, 44 U.S.L.W. 4789 (decided June 7, 1976).

⁷ Plaintiff does make the allegation that both defendants accept a greater proportion of Illinois residents in the entering class than residents from any other state. She claims this fact demonstrates the influence and control the State has over the admission policies of the schools. We believe that plaintiff's conclusion is not justified. The fact that both schools have a higher number of in-state residents may be directly related to the fact that more Illinois residents accept positions in the schools because they are conveniently located to their homes. In

giving of financial assistance by the state is tantamount to direct involvement of the state. See, *Weiss v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975); *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973); *Broadsen v. University of Pittsburgh*, 477 F.2d 1, 6 (3d Cir. 1973); *Brown v. Strickler*, 422 F.2d 1000, 1001 (6th Cir. 1970); *Racklin v. University of Pennsylvania*, 386 F.Supp. 992, 1001 (E.D. Pa. 1974); *Issacs v. Board of Trustees of Temple University*, 385 F.Supp. 473, 479 (E.D. Pa. 1974). We agree that in some situations state financial assistance can amount to state action. But in this case we do not believe that the character and amount of assistance mandates a finding of state action. As Justice Stevens (then Circuit Judge) stated in *Cohen v. I.T.T.*, 524 F.2d 818 at 825 (7th Cir. 1975):

"Two different conclusions may be drawn from the allegations relating to the State's support of I.T.T. First, it is plain that the school is not so heavily dependent on the State as to be considered the equivalent of a public university for all purposes and in all its activities. It would dramatically enlarge the state action concept to conclude that these facts are sufficient to require a complete surrender of a university's private character. . . ."

A reading of the cases indicates that the concept of state action depends not only upon the amount of state financial assistance but also upon the type of injury alleged. In this case, where there appears to be no state connection to the injury alleged, where there is no indication that the state exercises any control of the medical schools' admissions policies, it would be improper to divest the medical schools of their private character.

⁷ (Continued)

addition more Illinois residents probably apply for admission than residents of any other state. Even assuming that the admission policy favored Illinois residents we see no state action unless the schools' decision is directly related to some state control. And, even if the state did require that Illinois residents be favored, such a requirement is generally permissible under the Fourteenth Amendment. It is reasonable and rational that a state institution favor its own taxpayers, or the children of its taxpayers, in selecting an entering class. In any event, plaintiff has no standing to formally raise this claim since, assuming *arguendo* the defendants favor Illinois residents, she stands to benefit from such a policy.

This Court has followed the approach outlined by the Supreme Court in requiring a "nexus" between the state and the challenged conduct in several recent decisions. For example, in *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973), a doctor and a pregnant woman seeking to use a hospital's facilities for the purpose of performing an abortion filed a lawsuit against the hospital and its officials. Jurisdiction was claimed under §1983 based on the fact that the defendant hospital had "accepted financial support . . . from both the federal [Hill-Burton Act] and state governments, . . . [was] subject to detailed regulation by the State" and "had been an agency through which the State of Wisconsin and the United States Government [had] provided medical services for residents of Northeastern Wisconsin. . . ." 479 F.2d at 758, 761.

The Court rejected the claim of §1983 jurisdiction, finding that the "record [did] not reflect any governmental involvement in the very activity . . . being challenged." The Court made clear that the governmental involvement necessary to meet the "state action" requirement under §1983 must be "affirmative support" measured by its direct contribution to the conduct at issue. Such affirmative support was lacking in *Doe*, the Court held, as "there [was] no claim that the state [had] sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits." In sum, the Court concluded:

"The facts that defendants have accepted financial support, as alleged, from both the federal and state governments, and that the hospital is subject to detailed regulations by the state, do not justify the conclusion that its conduct, which is unaffected by such support or regulation, is governed by §1983." (479 F.2d at 761.)

See also *Driscoll v. International Union of Operating Engineers, Local 139*, 484 F.2d 682, 690 (7th Cir. 1973), *cert. denied* 415 U.S. 960 (1974): "To be regulable under constitutional standards through §1331 or §1983, the very activity of a private entity which a plaintiff challenges must be supported by state action that significantly

fosters or encourages that activity"; *Lucas v. Wisconsin Electric Company*, 466 F.2d 638, 654-56 (7th Cir. 1972) (en banc), *cert. denied* 409 U.S. 1114 (1973); *Bright v. Isenbarger*, 445 F.2d 412 (7th Cir. 1971) (per curiam).

Finally, this Court's recent decision in *Cohen v. Illinois Institute of Technology*, *supra*, is fully dispositive of plaintiff's §1983 claim here. There, a female assistant professor brought suit under §1983 against I.I.T. and some of its officers alleging that the university had discriminated against her in appointment, retention, and compensation on account of her sex. The district court dismissed the §1983 claim because I.I.T. is not a state school and plaintiff had not shown state involvement in the personnel practices which she challenged. 384 F.Supp. 202 (N.D. Ill. 1974).

This Court affirmed the dismissal stating:

"To support the proposition that the defendants acted under color of state law, plaintiff has made detailed allegations which may be considered in four parts: first, by using the word 'Illinois' in its name, I.I.T. has, in effect, held itself out as a state instrumentality; second, I.I.T. has received financial and other support from the state; third, I.I.T. is pervasively regulated by the state; and fourth, it has failed to take affirmative action to prevent I.I.T. from using gender as a criterion for faculty compensation and promotion. The complaint, however, contains no allegation that any State instrumentality has affirmatively supported or expressly approved any discriminatory act or policy, or even had actual knowledge of any such discrimination.

* * *

[T]here is no allegation in the complaint that the various forms of assistance given to I.I.T., or to its students, by the State, have had any impact whatsoever on the ability of Dr. Cohen, or any other member of her sex, to be treated impartially by the administration of the Institute. The State has lent significant support to I.I.T.; it is not, however, alleged to have lent any support to any act of discrimination [footnotes omitted]." 724 F.2d at 823-826.

Also see, *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 880 (5th Cir. 1975); *Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc.*, 507 F.2d 1103, 1105 (9th Cir. 1974); *Ward v. St. Anthony Hospital*, 476 F.2d 671, 674-75 (10th Cir. 1973); *Blackburn v. Fisk University*, 443 F.2d 121, 124 (6th Cir. 1971).

In this case all that plaintiff alleges is the receipt of state and federal financial assistance.* But, even assuming financial aid and assistance by the state in whatever amounts, such aid and assistance is insufficient for jurisdiction under §1983 unless it can be shown that the state has "affirmatively supported" the particular conduct challenged here.

Plaintiff asserts that her mere allegation of "particularly offensive discrimination in violation of national policy" obviates the requirement that there be a nexus between the state and the challenged activity. We cannot subscribe to such a position. For *Moose Lodge* itself, which articulated the nexus requirement, involved race discrimination which is obviously both offensive and in violation of national policy. And *Cohen* also involved the issue of sex discrimination; yet this Court was clear in its requirement that detailed state regulation is not enough

* Plaintiff has also sought to show that the federal financial assistance given to the defendants impliedly grants jurisdiction to the federal courts to consider allegations of discriminatory federal action. To support this Fifth Amendment claim she cites *Green v. Kennedy*, 309 F.Supp. 1127 (D.C. Cir. 1970), appeal dismissed sub nom *Cannon v. Green*, 398 U.S. 956 (1970); *Green v. Connally*, 330 F.Supp. 1150 (D.C. Cir. 1971), aff'd. sub nom *Cait v. Green*, 404 U.S. 997 (1971). But those suits were brought against a federal officer to enjoin direct government conduct which conferred tax exempt status upon racially segregated schools. The factual setting of those decisions were far different than the instant case. In this case which is primarily a §1983 suit (the HEW regional director joined as a defendant only because of alleged administrative misfeasance), the fact that there is federal support cannot be used to create §1983 jurisdiction. *Weiss v. Syracuse University*, 522 F.2d 397, 404 (2d Cir. 1975); *Greco v. Orange Memorial Hospital*, 513 F.2d 873, 876, n. 3 (5th Cir. 1975); *Blackburn v. Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971); *Browns v. Mitchell*, 409 F.2d 593, 595 (10th Cir. 1969). See *Birens v. Six Unknown Named Agents*, 456 F.2d 1339, 1346 (2d Cir. 1972). Furthermore, it should be noted that jurisdiction based on federal action has been interpreted analogously to that of state action. Thus plaintiff must show the same amount of significant involvement of the federal government in the discriminatory conduct that is being alleged. *Junior Chamber of Commerce v. United States Jaycees*, 495 F.2d 883 (10th Cir. 1974).

unless the "regulatory agency has encouraged the practice in question, or at least given its affirmative approval to the practice." (524 F.2d at 826.)

II. TITLE IX DOES NOT PROVIDE FOR A PRIVATE RIGHT OF ACTION IN THIS SITUATION.

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.*, prohibits discrimination based on sex in most educational institutions receiving federal financial assistance. Title IX states:

"No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Plaintiff maintains that Title IX provides an independent basis of federal jurisdiction for her action. On the other hand, the defendants claim that Title IX does not provide an independent cause of action in federal court, but rather, provides for mandatory administrative procedures followed only then by judicial review.

The question, we believe, is one of first impression.* Consequently we must look to the intent of Congress, as well as the experience of the courts in dealing with similar statutes.

Plaintiffs rely heavily upon previous decisions based upon Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq.*, the language¹⁰ of which is identical to Title

* Plaintiff claims that at least three actions have been maintained by private plaintiffs under Title IX, i.e., *Brenden v. Independent School Dist. 742*, 477 F.2d 1292 (8th Cir. 1973); *Berkelman v. San Francisco Unified School Dist.*, 501 F.2d 1264 (9th Cir. 1974); and *Trent v. Perritt*, 391 F.Supp. 171 (D.C. Mass. 1975). Plaintiff's reliance upon these decisions is clearly misplaced. Title IX, while mentioned in the decisions, was not relied upon as establishing jurisdiction. Those cases involved sex discrimination which amounted to a violation of the equal protection clause and there was no serious jurisdictional problem.

¹⁰ Title VI, 42 U.S.C. §2000d states, inter alia:

"No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

IX except that it bars racial discrimination. But our reading of the cases does not indicate that Title VI provides a private right of action for each individual discriminatee. Those cases involved an attempt by a large number of plaintiffs to enforce a national constitutional right. See *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967). Justice Blackmun in his opinion in *Lau* warned against an overly broad reading of the case, stating:

"I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom . . .

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[If] we . . . [were] concerned with just a single child . . . I would not regard today's decision . . . as conclusive." 414 U.S. at 571-72.

The limitations of *Lau* were adopted by the Tenth Circuit in *Serna v. Portales Municipal Schools*, 499 F.2d 1147, 1154 (10th Cir. 1974), when the Court noted:

"As Mr. Justice Blackmun pointed out in his concurring opinion in *Lau*, numbers are at the heart of this case and only when a substantial group is being deprived of a meaningful education will a Title VI violation exist."

It appears that *Lau* and *Bossier* were desegregation cases involving attempts to deprive large groups of minorities of their right to equal educational opportunities. But they simply do not give any real support to plaintiff's argument that we must infer an individual right of action under Title IX in favor of a person who has a grievance based upon sexual discrimination against a private educational institution receiving government funds.

Admittedly the courts have implied private causes of action under statutes which were silent as to the existence of a judicial remedy.¹¹ However, in this instance, constru-

¹¹ The courts have frequently allowed private rights of action under statutes which did not specifically provide for such an action. Usually, in this situation the court is called upon to utilize its power of statutory

ing Title IX to provide a private cause of action before the administrative remedy has been exhausted would be to violate the intent of Congress.

In enacting Title IX Congress established a scheme through which its prohibition against sex discrimination would be enforced by HEW, the administrative agency empowered to extend the federal aid. The statute encourages voluntary compliance in the first instance, an opportunity for an administrative hearing on the issue of discrimination if necessary, and the withdrawal of federal funds as a last resort for a recalcitrant institution which has been found to discriminate in violation of the Act.¹² After department or agency action there is a right to judicial review.¹³

¹¹ (Continued)

construction in conjunction with certain policy reasons for allowing a new independent cause of action. See, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Orsodo v. Wyman*, 397 U.S. 397 (1970); *Allen v. Board of Elections*, 393 U.S. 544 (1969); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967). This concept has become known as the "doctrine of implication". As stated in 77 Harv.L.Rev. 285, 286, "Implying Civil Remedies from Federal Regulatory Statutes":

"Some commentators find two separate theories in the doctrine of implication. One author speaks of the 'pre-existing duty' and 'statutory tort' theories. The pre-existing duty theory assumes that the statute is not creating a new cause of action, but is merely defining the standard of conduct required within the context of a duty already owed to the plaintiff. This analysis is most frequently used in tort cases where plaintiff's claim rests upon negligence codified by statutes such as the Federal railroad safety standards. The statutory tort theory . . . is derived from section 286 of the *Restatement of Torts* and allows creation of a new cause of action based on the statutory declaration that certain behavior, although perhaps previously legal, is now wrongful."

¹² 20 U.S.C. 1628 states, inter alia:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, . . . is authorized to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders. . . . Compliance . . . may be effectuated (1) by termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing of a failure to comply with such requirement. . . . Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. . . ."

¹³ (See preceding page) 20 U.S.C. §1683 states:

"Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may

It is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act. As the United States Supreme Court stated in *National Railroad Passenger Corp. [Amtrak] v. National Ass'n. of Railroad Passengers*, 414 U.S. 453, 458 (1974), while refusing to infer a private cause of action from the Rail Passenger Service Act of 1970:

"A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Worsted Mills v. United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed. 379 (1929)."

In *Securities Investor Protection Corp. v. Barbour*, 412 U.S. 412 (1975), the Supreme Court held that the Securities Investor Protection Act of 1970, which established a nonprofit corporation, SIPC, to provide financial relief to customers of failing broker-dealers, did not create a private right of action for such customers to compel SIPC to exercise its statutory authority for their benefit. Following *Amtrak*, the Court stated as follows:

"The respondent contends that since the SIPA does not in terms preclude a private cause of action at the instance of a member broker's customers, and since such customers are the intended beneficiaries of the Act, the Court should imply a right of action by which customers can compel the SIPC to discharge its obligations to them. As we said only last Term in analyzing a similar contention: 'It goes without

¹³ (Continued)

otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this Title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title."

saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.' *Passenger Corp v. Passenger Ass'n.*, 414 U.S. 453, 457-458 (1974)."

In *Cort v. Ash*, 422 U.S. 66 (1975) the Supreme Court held that a private right of action could not be implied by a shareholder under 18 U.S.C. §1610, which prohibits corporations from making contributions or expenditures in connection with certain federal elections. The Court based its decision in part on the absence of any evidence that Congress had intended a private right of action for violations of the statute (422 U.S. at 82-83).

The teaching of *Amtrak*, *SIPC* and *Cort*, *supra*, is that a private cause of action should not be lightly implied under a statute where Congress has not specifically provided one — especially where Congress has provided for other means of enforcement.¹⁴

The Congressional history of Title IV leaves no doubt that our legislators were quite concerned about women being placed in an unequal position in seeking admission to institutions of higher learning. U.S. Code Cong. and Admin. News 2462-2679, at 2512. But the Congressional reports indicate that many of the legislators believed that attempts at ending sexual discrimination were better achieved on a voluntary basis rather than by additional governmental regulation. Apparently none of the Congressmen envisioned the rather drastic remedy of individual lawsuits.¹⁵ None of the reports mention the fact that a private cause of action might be implied under Title IX.

¹⁴ In *Goldman v. First Federal Savings and Loan*, 518 F.2d 1247, 1250 n. 6 (7th Cir. 1975) this Court commented, but did not decide, that a private cause of action may not be permissible where Congress had provided for other means of enforcement.

¹⁵ See 1972 U.S. Code Cong. and Admin. News 2590 for the additional views of Congressmen Quie and Erlenborn that perhaps sexual discrimination could best be ended without the intrusion of a maze of government regulations. These comments are additionally persuasive since, if the Congressmen believed that Title IX provided for an independent cause of action in addition to the administrative regulations, they surely would have commented when stating in writing their various objections to Title IX.

From a policy viewpoint we see little to be gained by involving the judiciary in every individual act of discrimination based upon sex. Perhaps our resources would be better spent in litigation challenging wholesale sexual discrimination against a large number of men or women by a particular educational institution.¹⁶ Title VI has been effectively employed in this fashion and we see no reason why Title IX would not provide a similar jurisdictional base for those cases where the administrative abilities of HEW would be inundated or inadequate. However, for the day-to-day problems, stemming from the long overdue social revolution in equality of the sexes, we think the HEW administrative procedure is best.¹⁷ Although some commentators¹⁸ have taken the view that working through

¹⁶ We note, but do not decide, that a suit brought by a large group to enforce the national interest against sexual discrimination may be possible under Title IX. Certainly it was permitted by the Supreme Court under Title VI in *Lau v. Nichols*, *supra*.

¹⁷ Another objection to the implication of a private remedy arises where Congress has delegated authority to an administrative agency to enforce the statute. Under the doctrine of primary jurisdiction a court has no jurisdiction to accept a case until the issues, requiring resolution of questions within the agency's area of expertise, have been reviewed by the agency with the special competence to deal with the problem. In this case we believe that the HEW is in a much better position to evaluate the statistics of the applicant and entering classes at the various medical schools. In addition HEW has the benefit of comparing the local practice to the admission policies on a national level.

¹⁸ See 1974 Calif.L.Rev. Vol. 62:1124 at 1153; 1974 Texas L.Rev. Vol. 53:103 at 120; 1975 Temple L.Rev. Vol. 49:201 at 221-2. As stated in the Temple article, *supra*:

"A review of HEW's prior enforcement efforts utilizing procedures identical or similar to the rules under which Title IX will be enforced reveals glaring defects. The use of administrative proceedings as a method of enforcing regulations under HEW's authority can best be characterized by delay caused by protracted negotiations and failure to initiate enforcement proceedings within a reasonable time after noncompliance is found. Even where a voluntary compliance program is negotiated, HEW's failure to periodically follow up on implementation has resulted in the same areas of noncompliance being cited in subsequent reviews."

We only hasten to add that allowing individual litigation under Title IX is no solution. Individual suits invariably lead to delay, compromise, and inconsistent results. In the area of racial discrimination HEW efforts were similarly slow and ineffective in the early sixties. However, in the late sixties HEW vigorously utilized its enforcement procedures in integrating Southern schools. Perhaps the same battle will eventually be waged against sex discrimination through the use of Title IX.

HEW is painstakingly slow and ineffective,¹⁹ we fail to see how a private lawsuit by individual parties would facilitate an end to sex discrimination. To allow a private right of action would be engaging in judicial legislation. Considering our already overburdened system we fail to see why we should stretch a statute by judicial interpretation to the point where it would allow additional litigation which we may not be able to properly accommodate.

III. THE AGE DISCRIMINATION IN EMPLOYMENT ACT IS NOT APPLICABLE TO THIS CASE.

Plaintiff also seeks to claim jurisdiction for this suit under the Age Discrimination Employment Act of 1967, 29 U.S.C. §621 *et seq.*²⁰ Her amended complaint contends that the denial of admission to medical school has the effect of barring her from securing employment as a doctor of medicine. In addition to sexual discrimination she claims that she was denied admission because of her age.²¹

Plaintiff argues that each defendant medical school functions as an employment agency in regularly undertaking to procure doctors as employees for their university hospitals.

The term employment agency, as defined in 29 U.S.C. §630(c)²² means any person regularly undertaking with or

¹⁹ Plaintiff has also argued that the federal courts have jurisdiction under Title IX to review a sex discrimination claim when HEW has failed to take sufficient action on the administrative complaint. We need not decide that question in this case since the record indicates that HEW is actively investigating plaintiff's charges of sex discrimination by the medical schools. In this instance it would be improvident for us to find jurisdiction under Title IX as urged by plaintiff on the basis of naming HEW as a defendant and alleging agency inaction.

²⁰ 29 U.S.C. §621, *et seq.*, at 623(b) states, *inter alia*:

"It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age."

²¹ The complaint alleges that the Information Booklet for all United States medical schools published by the Association of American Medical Colleges includes in a summary description of the admissions criteria for the Pritzker School of Medicine the statement that: "Applicants over 30 without advance degrees . . . are not encouraged to apply." Of course for the purpose of this appeal we assume that the allegation is true.

²² 29 U.S.C. §630(c) states, *inter alia*:

"The term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such person, but shall not include an agency of the United States."

without compensation to procure employees for employers and includes an agent of such person. Litigation concerning the meaning of the term employment agency is rather sparse and primarily has been confined to cases arising under a very similar definition of the term under Title VII, 42 U.S.C. §2000e(c),²³ but generally it has been held to include "only those engaged to a significant degree in that kind of activity as their profession or business." *Brush v. San Francisco Newspaper Printing Co.*, 315 F.Supp. 577, 580 (N.D. Cal. 1970), aff'd. 469 F.2d 89 (9th Cir. 1972), cert. denied 410 U.S. 943. See also *Greenfield v. Field Enterprises*, 4 Fair Employment Practice Cases 548 (N.D. Ill. 1972).

In *Greenfield*, a Title VII case, the court stated that "the act clearly defines the activities of an employment agency in the traditional and generally accepted sense of that term . . . Nothing in the statute or legislative history suggest a broader or different meaning," (at 550). However, in a recent decision, *Kaplowitz v. University of Chicago*, 387 F.Supp. 42 (N.D. Ill. 1974) the district court acknowledged that a liberal construction of the term employment agency was required to best effectuate the purposes of Title VII, and found that the University of Chicago Law School was significantly involved in operating allegedly discriminatory placement facilities, stressing the importance to the school of finding employment for its graduates.²⁴

Taking plaintiff's allegations as true and further assuming for purposes of argument a liberal construction of the term employment agency holding that the defendants do operate employment agencies, we nevertheless agree with the district court that the complaint fails to allege age discrimination in connection with employment.

Plaintiff is seeking admission to the defendant schools as a medical student, not as an individual seeking em-

²³ 42 U.S.C. §2000e(c) states, inter alia:

"Any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes agents of such a person."

²⁴ The Court in *Kaplowitz*, supra, did not need to make an express finding that the law school acted as an employment agency in order to decide the case. Thus the language relied upon by plaintiff is dicta.

ployment through the schools. Plaintiff admits that the defendants have not failed or refused to refer her for employment on the basis of her age. The purpose of the act is to provide employment opportunities and hiring for persons between the ages of 40 and 65 without discrimination based on age. This purpose was based upon the finding that older workers found themselves disadvantaged in their efforts to retain or regain employment after being dismissed from their jobs. Nothing in the statute nor the legislative history suggests a broader interpretation. In order for an individual to state a claim under the act, that individual must be qualified to accept employment and only then have been discriminated on the basis of age. Plaintiff's claim is too remote — she has not successfully completed the necessary prerequisites to be in a position to fall within the protection of the Act. Her complaint merely amounts to an allegation of discrimination in admission to a university and fails to state anything beyond a remote connection to discrimination in employment. As such, she fails to state a claim under the 1967 Age Discrimination in Employment Act.

We also note that procedurally plaintiff has failed to comply with the Age Discrimination in Employment Act. The Act authorizes a civil action only after giving notice to the Secretary of Labor sixty days before the suit is filed under 29 U.S.C. 626(d).²⁵ The purpose of this requirement is to allow the Secretary an opportunity "to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." There is no indication in the record that plaintiff has complied with this jurisdictional prerequisite. Therefore, even if we accepted plaintiff's argument that a valid cause of action

²⁵ 29 U.S.C. 626(d) states, inter alia:

"No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of any intent to file such an action. Such notice shall be filed —

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal means of conciliation, conference, and persuasion."

existed under the Act we would still have to dismiss for want to jurisdiction.

IV. JURISDICTION DOES NOT EXIST UNDER THE PUBLIC HEALTH SERVICES ACT NOR THE ADMINISTRATIVE PROCEDURE ACT.

Section 799A of the Public Health Services Act²⁶ provides that the Secretary of HEW may not give financial assistance to schools which discriminate on the basis of sex. Plaintiff claims that this statute gives her the right to maintain a private right of action against the medical schools as a third party beneficiary under the Act. Although Section 799A does not provide for a private cause of action there have been some situations in which the courts have allowed a suit to go forward under an implied right theory.²⁷

In this case we believe that to imply jurisdiction under the Act for a private lawsuit would be improvident. This is a suit by a single plaintiff against two predominantly private institutions. In fact, should a court grant her requested relief it would require discriminating against the 2,000 other applicants who had better qualifications than plaintiff.

Finally, plaintiff claims that jurisdiction exists under §706 of the Administrative Procedure Act which authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed." We cannot sustain this suit on this jurisdictional basis since HEW is actively investigating plaintiff's complaint and the delay involved of about one year has not been unreasonable.

²⁶ Section 799A of the Public Health Services Act, 42 U.S.C. 295h-9 states, inter alia:

"The Secretary may not make a grant . . . for the benefit of any school of medicine . . . unless the application for the grant . . . contains assurances satisfactory to the Secretary that the school or training center will not discriminate on the basis of sex in the admission of individuals to its training programs. . . ."

²⁷ See *Euresti v. Stenner*, 458 F.2d 1115 (10th Cir. 1972); *Organized Migrants in Community Action, Inc. v. James Arthur Smith Hospital*, 325 F.Supp. 268 (S.D. Fla. 1971); *Cook v. Ochsner Foundation Hospital*, 319 F.Supp. 603 (E.D. La. 1970); *Porrier v. St. James Parish Police Jury*, 372 F.Supp. 1021 (E.D. La. 1974).

Accordingly, the decision of the district court in dismissing the complaint is hereby affirmed.

AFFIRMED.

A true Copy:

Teste:

.....
*Clerk of the United States Court of
Appeals for the Seventh Circuit*

In the
United States Court of Appeals
 For the Seventh Circuit

No. 76-1238

GERALDINE G. CANNON,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF CHICAGO, et al.,

Defendants-Appellees.

No. 76-1239

GERALDINE G. CANNON,

Plaintiff-Appellant,

v.

NORTHWESTERN UNIVERSITY, et al.,

Defendants-Appellees.

On Rehearing

DECIDED AUGUST 9, 1977

Before SPRECHER, BAUER, *Circuit Judges*, and GRANT,
Senior District Judge.*

* The Hon. Robert A. Grant, United States District Court
 for the Northern District of Indiana, is sitting by designation.

BAUER, *Circuit Judge*. After issuing our opinion in this case, we granted plaintiff's petition for rehearing of the issue of whether a private right of action lies under Title IX of Public Law 92-318 in the circumstances of this case.¹ We took this step principally to give the parties an opportunity to develop the question of whether the inclusion of Title IX within the provisions of the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, requires a different resolution of the Title IX issue presented to us. Also, we were concerned that we had misconstrued the import of *Lau v. Nichols*, 414 U.S. 453 (1974), in resolving the Title IX issue against the plaintiff.

After considering the new briefs submitted by the parties, we remain convinced that no private cause of action lies under Title IX in the circumstances of this case. Accordingly, we adhere to our previous judgment affirming the district court's dismissal of plaintiff's complaint for the reasons noted below.

I.

Shortly after the decision in the case at bar, Congress enacted the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified at 42 U.S.C.A. § 1988 (1977 Supp.)) The statute provides in relevant part:

"In any action or proceeding to enforce a provision of . . . title IX of Public Law 92-318, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

On rehearing, plaintiff concedes that the legislative history of the Act makes clear that the Act was not designed to create any remedies for violations of federal civil rights not already authorized under the statutes covered by the Act. E.g., Sen. Rep. No. 94-1011, 94th

¹ We denied plaintiff's petition for rehearing of the other issues raised and decided in our opinion, and the Court internally stayed action on plaintiff's suggestion for rehearing en banc of the entire case pending our decision on rehearing.

Cong., 2d Sess. 6 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 5913; 122 Cong. Rec. S 16525 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy); 122 Cong. Rec. H. 12153 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan). However, plaintiff argues that the Act's inclusion of Title IX constitutes a "most emphatic and unmistakable declaration" of Congress's understanding and intent that private suits by individuals are permitted under Title IX, for the inclusion of Title IX in the Act makes no sense unless Congress believed that private rights of action were already authorized under Title IX itself. In support of her argument, plaintiff refers us to the remarks of various members of Congress made during debates on the Attorney's Fees Award Act,² which suggest that at least those members of Congress assumed that private suits were permitted under all of the statutes included in the Act, including Title IX. Plaintiff would have us view those remarks as a subsequent expression of Congress's previous intent in enacting Title IX. This subsequent declaration of Congress's pre-existing intent, says plaintiff, must be given at least "great" if not "conclusive" weight in determining whether we should imply a private right of action under Title IX.³

Defendants answer that the Act's inclusion of Title IX could be construed as simply indicating an intent to provide for the award of attorney's fees to the prevailing party in any proceeding for judicial review of agency action already expressly provided in Title IX under 20

² 122 Cong. Rec. S 17052 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk); 122 Cong. Rec. S 17051 (daily ed. Sept. 29, 1976) (remarks of Sen. Tunney); 122 Cong. Rec. S 16431 (daily ed. Sept. 22, 1976) (remarks of Sen. Hathaway); 122 Cong. Rec. S 16262 (daily ed. Sept. 22, 1976) (remarks of Sen. Allen); 122 Cong. Rec. S 16252 (daily ed. Sept. 21, 1976) (remarks of Sen. Scott); 122 Cong. Rec. H 12165 (daily ed. Oct. 1, 1976) (remarks of Rep. Sieberling); 122 Cong. Rec. H 12159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

³ *Glidden Co. v. Zdanok*, 370 U.S. 530, 541-42 (1961); *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Sioux Tribe v. United States*, 316 U.S. 317, 329-30 (1942); *New York Philadelphia & Norfolk R.R. v. Peninsula Produce Exchange*, 240 U.S. 34, 39 (1915); *Cope v. Cope*, 137 U.S. 682, 688 (1891).

U.S.C. § 1983. Thus, Title IX's inclusion in the Attorney's Fees Award Act would make sense, say defendants, even if we implied no judicial cause of action on behalf of private parties. Moreover, the defendants argue, even if the Act was intended to authorize the award of attorney's fees to the prevailing party in private party litigation brought to enforce the provisions of Title IX, we should not therefore assume that Congress necessarily was expressing either an understanding that a private right of action already existed under Title IX or an intent to encourage courts to imply one; rather, Congress simply could have been providing for the contingency that future court decisions might imply a private right of action from the provisions of Title IX.

As we read the legislative history of the Attorney's Fees Award Act, it provides no support for plaintiff's argument that the inclusion of Title IX within the Act was intended to provide a private right of action under Title IX. At best, the remarks to which plaintiff has referred us suggest only that some members of Congress may have assumed that private suits were authorized under all of the statutes included within the Act. But, even if the entire Congress shared the assumption that a private right of action was authorized by Title IX, none of the precedents on which plaintiff relies would be controlling, for they involved subsequent legislative history explicitly declarative of Congress's own intent in passing a given statute, rather than a mere assumption concerning a judicial construction that had been or might be placed on a statute after its enactment.

Notwithstanding plaintiff's strained efforts to rewrite the legislative history of Title IX, we find nothing in the legislative history of the Attorney's Fees Award Act that gives us cause to reconsider our holding that no private right of action exists under Title IX. As defendants argue, the legislative history indicates that Congress included Title IX within the Act only to provide for the possibility that the statute might be construed in the future as authorizing judicial implication of a private right of action. This seems clear from a colloquy among Representatives Quie, Anderson, Drinan, Bauman and Railsback, in which Representatives Quie and Bauman

expressed concern that the Attorney's Fees Award Act might be construed as impliedly authorizing private individuals to bring suit under Title IX. 122 Cong. Rec. H. 12152-53 (daily ed. Oct. 1, 1976). Representatives Anderson, Drinan and Railsback, all supporters of the bill, denied that it would effect any change in pre-existing law concerning an individual's right to sue under Title IX. Representative Railsback made their position clear:

"I would simply like to point out that, as I understand it, it is clearly not the intent of Congress to create a new remedy, but that, rather, this bill would create a remedy only in the event that the courts should in the future determine that an individual may sue under the statutes.

And the bill does not authorize or statutorily grant any private right of action which does not now exist. At least I feel certain that is our intent. I think we ought to establish that in the Record." 122 Cong. Rec. H. 12152 (daily ed. Oct. 1, 1976).

Representative Drinan, the House sponsor of the Senate bill under consideration, "concur[red] completely" in Representative Railsback's comments: "We do not create any new statutory right of action in the bill today." 122 Cong. Rec. H. 12153 (daily ed. Oct. 1, 1976). Any ambiguity inherent in the above record was dispelled by Representative Railsback's subsequent remarks that went unchallenged during final debate on passage of the bill:

"Mr. RAILSBACK. Mr. Speaker, I rise in support of S. 2278 which is designed to allow the court, in its discretion, to award reasonable attorney fees to prevailing parties—other than the United States—in suits to enforce the Civil Rights Acts which Congress has enacted since 1866.

* * * * *

Mr. Speaker, In considering S. 2278 for passage today, I have been alerted to several legal issues which were not raised at hearings held by the Senate and House committees. Not wishing to

establish any legal precedents by implication, I would like to make several points explicitly clear with respect to the intent of this bill

I have been informed by the Committee on Education and Labor as well as several education associations that under title VI of the Civil Rights Act and title IX of the Education Amendments of 1972 there exists a serious question as to whether an individual complainant or class of complainants has the right to sue as a private plaintiff. To date the Department of Health, Education and Welfare has been the prime enforcer of these titles and in the case of Cannon against University of Chicago, the Seventh Circuit U.S. Court of Appeals stated that Congress gave the right of action to HEW and not to private individuals.

It has been brought to my attention that by granting attorneys' fees to prevailing parties other than the United States, Congress might implicitly authorize a private right of action under title VI and title IX. This is not the intent of Congress. This bill merely creates a remedy in the event the courts determine that an individual may sue under these statutes. This bill does not authorize or statutorily grant any private right of action which does not now exist." 122 Cong. Rec. H 12161 (daily ed. Oct. 1, 1976).

We doubt that the legislative history could be much clearer. Congress certainly was not engaged in any effort to rewrite the legislative history of Title IX or to declare its pre-existing intent to create a private right of action thereunder when it included Title IX within the provisions of the Attorney's Fees Award Act. As is clear from Representative Railsback's reference to our holding in the case at bar, Congress did not intend to imply any opinion on the merits of the question before us here. The Act's inclusion of Title IX was intended merely to provide for the possibility that some court might deem it appropriate in the future to imply a private right of action from the provisions of Title IX. It was not intended to do more.

II.

Although our principal motivation in granting rehearing was to obtain the parties' views on the potential impact of the Attorney's Fees Award Act of 1976 on our resolution of the Title IX issue, we were also curious as to why the Department of Health, Education and Welfare, which had consistently supported its codefendants' position that no private cause of action lies under Title IX, did an about face on the merits of that issue in its answer to plaintiff's petition for rehearing. Unfortunately, neither the Department's answer nor its subsequent brief on rehearing explains why the Department no longer believes that "Title IX's administrative procedural remedies were meant to suffice in enforcing Title IX's prohibitions against sex discrimination." Supplemental Brief of the Department of Health, Education and Welfare, Office of Civil Rights at 8. Whatever the reason for the Department's change of heart, it has now adopted the position that implication of a private cause of action under Title IX is justified under the criteria set out in *Court v. Ash*, 422 U.S. 66 (1975):

"In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.* at 78 (emphasis in original) (citations omitted.)

In view of the plaintiff's new arguments regarding Congress's implicit legislative intent in enacting Title IX and the Department's lengthy arguments from *Court*, we will briefly restate our reasoning in terms thereof.

Assuming *arguendo* that plaintiff is a member of the class for whose benefit Title IX was enacted, and that a Title IX action would not displace remedies traditionally available at state law, we remain of the view that implication of a private judicial remedy would be inconsistent with the legislative intent and underlying purposes of the statutory scheme.

We are unpersuaded by the Department's argument that implication of a private right of action must be deemed consistent with the legislative purposes of Title IX simply because private party suits would provide a useful means of enforcing the statutory policy of prohibiting discrimination on the basis of sex in federally funded educational programs. Such an argument goes too far, for implication of a private right to enforce every federal statute would have the same effect of assisting agency efforts to obtain compliance with federal policies. Simply put, the argument begs the question of whether implication of a private judicial remedy is consistent with the purposes of a legislative scheme that gives responsibility for enforcing its statutory policies to an administrative agency rather than to "private attorneys general." We think it clear from the face of the statute and the regulations promulgated pursuant thereto that, in providing private parties with an administrative but not a judicial forum in which to raise complaints of sex discrimination,⁴ it

⁴ Section 901(a) of Title IX prohibits discrimination on the basis of sex in federally funded educational programs. 20 U.S.C. § 1681(a). Section 902 provides for administrative enforcement of the statutory prohibition by *directing* each federal agency providing financial assistance "to effectuate the provisions of Section 1681 . . . by issuing rules, regulations or orders of general applicability which shall be consistent with the objectives of the statute . . ." 20 U.S.C. § 1682. Pursuant to the directive given above, the Department of Health, Education and Welfare has established interim regulations permitting private parties to file complaints of sex discrimination and providing for a prompt and thorough investigation of any such complaints. 45 C.F.R. § 86.71, *adopting by reference* 45 C.F.R. § 80.7(b). The Department's regulations provide that compliance shall be secured by informal means, if possible, and otherwise by "any other means authorized by law." 45 C.F.R. § 86.71, *adopting by reference* 45 C.F.R. § 80.8(a). However,

was Congress's purpose to commit the screening of Title IX complaints to the administrative agencies charged with the responsibility of overseeing federally funded educational programs and to encourage resolution of those complaints by means of agency conciliation efforts directed at achieving voluntary compliance with the statutory prohibition. Those purposes would not be served by implying a statutory cause of action that would permit private parties to circumvent the remedial scheme created by Congress. See, e.g., *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975).

Nor are we convinced that there is anything in the legislative history of Title IX indicative of an explicit or implicit intent to create or allow a private right of action. We are told that because federal court decisions implying a private right of action under Title VI of the Civil Rights Act of 1964 existed at the time Title IX was adopted,⁵ we may infer that Congress intended that a

⁴ continued

"(d) No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days, additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate." 45 C.F.R. § 86.71, adopting by reference 45 C.F.R. § 80.8(d).

⁵ Plaintiff calls to our attention a number of such cases. *Alvarado v. El Paso Indep. School Dist.*, 445 F.2d 1011 (5th Cir. 1971); *Kelley v. Altheimer Public School Dist.*, 378 F.2d 485 (8th Cir. 1967); *Cypress v. Newport News General and Nonsectarian Hospital Ass'n.*, 375 F.2d 648 (4th Cir. 1967); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).

The Department of Health, Education and Welfare also refers us to a number of district court cases and the Sixth Circuit's decision in *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967), cert. denied, 390 U.S. 921 (1968).

private judicial remedy be made available under Title IX in view of Congress's explicit intent to pattern the remedial provisions of Title IX after those of Title VI. First of all, we do not read those decisions as affirmatively establishing the existence of an implied private right of action under Title VI at the time Title IX was enacted.⁶ More important, there is nothing in the legislative history of Title IX itself indicating that Congress was even aware of those decisions, let alone intended to adopt their construction of Title VI.

⁶ Most of the cases cited in note 5 *supra* were in fact explicitly brought under the authority of 42 U.S.C. § 1983 to redress violations of rights granted by Title VI, and not under the implied auspices of Title VI itself. In view of the fact that the cases were brought under Section 1983, statements made therein that private parties had stated a claim under Title VI must be read as simply a shorthand way of saying that a cause of action under Section 1983 had been made out by virtue of the sufficiency of the allegations that Title VI had been violated.

We suspect that even the cases that do not expressly mention Section 1983 were in fact brought under that statute, for all the cases cited to us appear to have been brought against public agencies acting under color of state law. Although the Fifth Circuit's broad dictum in *Bossier* lends some support to plaintiffs' assertion that it recognized an implied right of action under Title VI, we note that the suit was brought to desegregate a public school system, and the court's actual holding was merely that "these plaintiffs have standing to assert their right to equal educational opportunities with white children." 370 F.2d at 852 (emphasis added). As we read the case, *Bossier* relies on Title VI's prohibition of racial discrimination in federally funded educational programs merely to give plaintiffs the requisite standing to sue "to enforce a national constitutional right." *Id.* at 851 (emphasis added). As the suit was brought to enforce "the constitutional right of Negro school children to equal educational opportunities with white children," *id.* at 849, we doubt that the court meant to hold that private parties have an implied cause of action under Title VI alone. Moreover, it seems logical to assume that the suit was brought under the authority of Section 1983, for, as far as we know, no precedent existed at the time *Bossier* was decided for the proposition that anyone could bring a suit directly under the Fourteenth Amendment to enforce rights guaranteed by the equal protection clause without some independent statutory authorization such as Section 1983.

Given the lack of any explicit or implicit intent to create a private judicial remedy in the legislative history of Title IX itself, we remain of the view that Congress's express provision of a sophisticated scheme of administrative enforcement should be construed as an indication of an implicit legislative intent to exclude any private judicial remedies for violations of Title IX other than the judicial review mechanism Congress made available to private parties in the statute. See *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-61 (1974); *Goldman v. First Federal Savings and Loan Ass'n*, 518 F.2d 1247, 1250 n.6 (7th Cir. 1975).

We recognize, of course, that *Court v. Ash*, *supra* at 82, states that it is not necessary for the legislative history of a statute to show an explicit intent to create a private right of action for us to imply one for violations of a federally created right. It does not follow, however, that we *must* imply a private right of action simply because the legislative history shows no explicit intent to deny one. Were we confronted with an alleged violation of a fundamental federal constitutional or statutory right for which Congress has provided no remedy at all, or for which the remedies available have proven to be wholly inadequate to the task of protecting those rights, we might take a different view of the matter. E.g., *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 390-97 (1971); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 206-07 (1944); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1285-87 (7th Cir. 1977). Under the circumstances of this case, however, we believe it would be an unwarranted exercise of federal judicial power to imply a private right of action in the face of a sophisticated scheme of administrative enforcement and judicial review that, if given an opportunity to work, may well prove itself adequate to the task for which Congress designed it. Simply put, notwithstanding the Department's change of heart, we remain unpersuaded that it is a "necessity" to imply a private right of action under Title IX to effectuate the purposes of Congress's legislative scheme. *Piper v. Cris-Craft Indus., Inc.*, 97 S. Ct. 926, 941 (1977).

III.

We have on rehearing also reconsidered plaintiff's argument that *Lau v. Nichols*, 414 U.S. 453 (1974), controls the case before us.

Previously we distinguished *Lau* on the ground that it involved a class suit against a public school system rather than an individual suit against the private universities before us here. In so doing, we relied heavily on the Tenth Circuit's reading of Mr. Justice Blackmun's concurring opinion in *Lau*, which prompted that court to conclude that "only when a substantial group is being deprived of a meaningful education will a Title VI violation exist." *Serna v. Portales Municipal Schools*, 499 F.2d 1147, 1154 (10th Cir. 1974); accord, *Otero v. Mesa County Valley School Dist. No. 51*, 408 F. Supp. 162, 170-72 (D. Colo. 1975); see *Pabon v. Levine*, 70 F.R.D. 674, 676-77 (S.D.N.Y. 1976) (Weinfeld, J.).

On rehearing, both the Department and the plaintiff argue that we misconstrued the import of Justice Blackmun's concurring opinion in *Lau*, which states:

"If we . . . [were] concerned with just a single child, . . . I would not regard today's decision . . . as conclusive on the issue of whether the statute and the guidelines required the funded school district to provide special instruction." 414 U.S. at 571-72.

Justice Blackmun's caveat, we are told, was directed only to the appropriateness of the type of relief ordered in that case rather than to the question of whether a Title VI violation would have been made out if only a single plaintiff was involved.

We are not convinced that our reliance on *Serna's* reading of *Lau* was misplaced, but, even if we were, we would still adhere to our statement that *Lau* provides no real support for plaintiff in the circumstances of this case. Our conclusion would remain the same because *Lau* was brought under the authority of 42 U.S.C. § 1983, and the question of whether an implied private right of action lay directly under the provisions of Title

Nos. 76-1238 & 76-1239

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VI was never presented to the Supreme Court.⁷ Because plaintiffs' cause of action in *Lau* arose under 42 U.S.C. § 1983, *Lau* simply cannot be read as supporting the proposition that private parties have an implied cause of action under Title VI that would mandate implication of a private right of action here under the comparable provisions of Title IX. Accordingly, neither *Lau* nor any other decision relying thereon for the proposition that an implied private right of action lies directly under Title VI is of help to the plaintiff at bar, who is unable to invoke 42 U.S.C. § 1983 because she is suing private universities acting under color of no state law.

We adhere to our previous holding that no private right of action lies under Title IX in the circumstances of this case.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

⁷ The jurisdictional statement in the *Lau* plaintiffs' complaint shows that their constitutional and statutory claims were brought under 42 U.S.C. § 1983:

"Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 and by 28 U.S.C. § 1343(3)(4), which provide original jurisdiction in suits authorized by 42 U.S.C. § 1983." Plaintiffs' Complaint for Injunctive and Declaratory Relief, *Lau v. Nichols*, 414 U.S. 453 (1974) (emphasis added).

A review of the briefs filed in the Supreme Court reveals that the parties presented no jurisdictional issues to the Court, and at least one of the amicus briefs filed in support of plaintiffs' claims makes explicit that

"petitioners sought in this action, brought under 42 U.S.C. § 1983, to require respondents to provide them assistance in learning English so that they might benefit from school as other children do. They contended that respondents' failure to provide such assistance violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 and regulations thereunder." Brief for the National Education Association and the California Teachers Association as Amici Curiae at 5, *Lau v. Nichols*, 414 U.S. 453 (1974) (emphasis added)



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGION V

300 SOUTH WACKER DRIVE
CHICAGO, ILLINOIS 60606

OFFICE OF
THE REGIONAL DIRECTOR

June 2, 1976

Mr. John Cannon
2420 The Strand
Northbrook, Illinois 60062

Dear Mr. Cannon:

This is to inform you of the present status of the complaints filed by Mrs. Geraldine Cannon against various medical schools in the State of Illinois. We have completed the on-site portion of the investigations into your client's allegations.

However, the issues raised by the complaints are of first impression and national in scope. As a result national Office for Civil Rights policy must be developed. The authority for formulating national policy rests in our Headquarters office. Because of the involvement of that Office and the need for an in-depth study of the issues raised, I am unable to give you an exact date for the release of findings in the cases.

Please be assured that we will move as expeditiously as possible in this matter.

Sincerely,

Charles E. Duffy
Chief
Higher Education Branch
Office for Civil Rights
Region V



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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20201

OFFICE OF THE
GENERAL COUNSEL

September 17, 1974

Dr. Bernice Sandler
Executive Associate
Project on the Status and
Education of Women
Association of American Colleges
1818 R Street, N. W.
Washington, D.C. 20009

Dear Dr. Sandler:

Peter Holmes has asked me to respond to your letter to him of July 18, 1974, in which you inquire whether individuals who allege discrimination on the basis of sex have a private right to bring suit against an educational institution pursuant to Title IX of the Education Amendments of 1972. You were particularly concerned as to whether a private suit could be brought against a private institution under Title IX. The private right to bring suit against an educational institution has been held to exist under the analogous provisions of Title VI of the Civil Rights Act of 1964, *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), and we believe that the holding in that case would be followed under Title IX.

The first part of your question concerns the private right of suit under Title IX against educational institutions generally. In *Bossier Parish*, the Fifth Circuit found for private plaintiffs who had brought suit under Title VI against a school district which, they alleged, discriminated on the basis of race.

The Court held that Section 601 of Title VI stated a "reasonable condition that the United States may attach to

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any grant or financial assistance and may enforce by refusal or withdrawal of Federal assistance." 370 F.2d at 852. Therefore, once the school district accepted Federal financial assistance, it brought its school system within the class of programs subject to the Section 601 prohibition against discrimination and "[N]egro school children, as beneficiaries of the Act, have standing to assert their Section 601 rights." 370 F.2d at 852.

It should be noted that the case did not address two other issues: first, the question of whether HEW is an indispensable party, and second, whether a complainant would be required to exhaust his/her administrative remedies by filing a complaint with HEW and allowing the Department to attempt to secure voluntary compliance and to initiate enforcement proceedings against the discriminator, if necessary.

The proposed Title IX Regulation, 45 CFR part 86.4(a) requires as a condition of Federal financial assistance, an assurance, satisfactory to the Director, that each program or activity operated by the recipient will comply with Title IX and the Regulation. Part 86.4(b) (3) further states that such assurance shall obligate the recipient for the period during which Federal financial assistance is extended. This requirement is directly analogous to the assurance required of a recipient by Title VI, and would carry with it the same obligations concerning the prohibited discrimination and concerning the rights of beneficiaries under Title VI. Private plaintiffs under Title IX would have the right of suit as beneficiaries of the Act, and would have standing to assert their Section 901 rights.

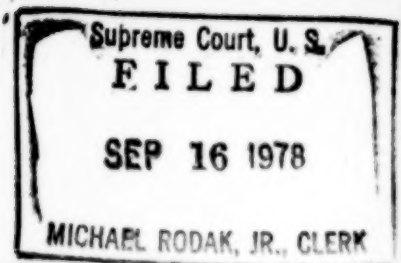
The second part of your question concerned standing to bring a private suit against a private institution under Title IX. At the outset, let me say that the standing of a private litigant to sue under Title IX does not rest on the public or private nature of the institution involved, although the nature

of the discrimination which may validly be challenged in such a suit does. Title IX deals with three general areas in which sex discrimination is prohibited: admissions, treatment, and employment. Section 901(a) (1) of Title IX specifically exempts private undergraduate institutions from the prohibition of discrimination on the basis of sex in admissions. However, private graduate and professional institutions are subject to the discrimination prohibition in all three areas covered by the Act. A private plaintiff would have standing to bring a Title IX suit against a private undergraduate institution for discrimination on the basis of sex in treatment and employment, and against a private graduate or professional institution for discrimination on the basis of sex in all three areas covered by the Act, but would be barred from bringing such a suit against a private undergraduate institution in the area of admissions because of the statutory exemption.

I hope that these comments will be of assistance to you, and please do not hesitate to let me know if you have further questions.

Sincerely,

Theodore A. Miles
Assistant General Counsel



APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 28, 1977
CERTIORARI GRANTED JULY 3, 1978

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON

Petitioner,

vs.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

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RELEVANT DOCKET ENTRIES
IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 75-2402 (U. Chi.)	No. 75-2724 (Nw.)	
July 18, 1975	Aug. 14, 1975	Verified Complaint filed.
Aug. 18, 1975	Sept. 19, 1975	Motion to Dismiss filed.
Sept. 11, 1975	Oct. 3, 1975	Motion to Dismiss allowed.
Sept. 18, 1975	Oct. 8, 1975	Motion to Alter or Amend Judgment filed.
Sept. 23, 1975		Oral Argument on Motion to Alter or Amend Judgment heard.
Sept. 26, 1975	Oct. 9, 1975	Motion to Alter or Amend Judgment allowed.
Sept. 30, 1975	Oct. 10, 1975	Amended and Supplemental Complaint filed.
Oct. 2, 1975	Oct. 28, 1975	Motion to Dismiss filed.
Dec. 8, 1975	Dec. 8, 1975	HEW Answer filed.
Jan. 15, 1976	Jan. 15, 1976	Motion to Dismiss allowed.
Feb. 19, 1976	Feb. 19, 1976	Notice of Appeal filed.

RELEVANT DOCKET ENTRIES
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

March 3, 1976 Pre docketing conference consolidating cases
for briefing and argument.
June 4, 1976 Oral argument heard.
August 27, 1976 Opinion filed.
August 9, 1977 Opinion on rehearing filed.
October 3, 1977 Order denying rehearing and suggestion for
rehearing en banc entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 75C 2402¹

GERALDINE G. CANNON,

Plaintiff,

v.

THE UNIVERSITY OF CHICAGO; and DR. LEON O. JACOBSON,
Dean; DR. JOSEPH J. CEITHAML, Dean of Students; and JOHN
DOE and MARY ROE, the Admissions Committee; of The
Pritzker School of Medicine, each individually and in their
official capacities,

Defendants,

and

THE SECRETARY OF HEALTH, EDUCATION AND WELFARE, the
HON. DAVID MATTHEWS, and the REGIONAL DIRECTOR OF THE
OFFICE FOR CIVIL RIGHTS, REGION V, DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE, MR. KENNETH A. MINES, in their
official capacities,

Additional Parties.

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiff, by her attorneys, complains against defendants as
follows:

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to the
provisions of Title 28, United States Code, sections 1331,

¹ The Amended and Supplemental Complaint in the case against
Northwestern University et al., No. 75C 2724, is substantially identi-
cal. (the "Nw. Am. Comp.").

1343(3), 1343(4), 1345, 1346, 2201 and 2202, this being a civil action authorized (i) by the Civil Rights Act of 1871, Title 42, United States Code, section 1983 to redress and remedy the deprivation under color of State statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Constitution and laws of the United States, (ii) by the Civil Rights Act of 1964, Title 42, United States Code, sections 2000c-6 and 2000c-8, as amended by Title IX of the Education Amendments of 1972, P.L. 92-318, Title 20, United States Code, section 1681 *et seq.*, to redress and remedy the denial of admission to an education program or activity receiving Federal financial assistance on the basis of sex, and in violation of written contractual assurances against such discrimination filed by or on behalf of defendants under and pursuant to section 799 of the Public Health Service Act, Title 42, United States Code, section 295h-9, with the Secretary of Health, Education and Welfare for the benefit of plaintiff and others as third-party beneficiaries, (iii) by section 7(c) of the Age Discrimination in Employment Act of 1967, Title 29, United States Code, section 626(c), to remedy discrimination in professional education and employment on the basis of age, and (iv) by sections 702 and 703 of the Administrative Procedure Act, Title 5, United States Code, sections 1009(a) and 1009(b) and sections 902 and 903 of said Education Amendments of 1972, Title 20, United States Code, sections 1682 and 1683.

Parties

2. Plaintiff, Geraldine G. Cannon, a resident of Northbrook, Illinois, is an adult female who is a citizen of the United States and of the State of Illinois.

3. All defendants transact business and are found within the Northern Federal Judicial District of Illinois, Eastern Division.

4. Defendant, The University of Chicago, a not-for-profit corporation organized under the laws of the State of Illinois,² is an institution of learning and professional education conducting its college, divisions and other schools, including The Pritzker School of Medicine, under Illinois law, custom and usage and receiving State and Federal financial assistance in the education program and activity of said school, and is an employer utilizing the service of said school as an employment agency, placement service, training school or center or other source in the hiring or recruitment of doctors of medicine regularly undertaking with or without compensation to procure doctors as employees for said university's hospitals and other employers of doctors.

5. Defendants, Dr. Leon O. Jacobson, Dean; Dr. Joseph J. Ceithaml, Dean of Students; and John Doe and Mary Roe whose identities are unknown to plaintiff at the present time, the Admissions Committee; of The Pritzker School of Medicine, are sued individually and in their official capacities. The Secretary of Health, Education and Welfare (the "Secretary"), the Hon. David Matthews, and the Regional Director of the Office for Civil Rights, Region V, (the "Regional Director"), Mr. Kenneth A. Mines, are joined as parties in this Amended and Supplemental Complaint pursuant to Rules 17, 18, 19 and 20, Federal Rules of Civil Procedure, and sued in their official capacities for the alternative relief prayed herein with respect to official action or inaction by said officials. Plaintiff believes the Secretary and the Regional Director may be aligned as plaintiffs in this case and, unless the context otherwise requires, said officials are not included in the term "defendants" as used herein.

² "under a special act of the legislature of the State of Illinois" in Nw. Am. Comp.

Facts

6. On or about October 15, 1974, plaintiff duly and timely applied for admission to the September 1975 entering class at The Pritzker School of Medicine.

7. Plaintiff presented qualifications which included completion of all pre-requisite courses of study specified by the school as requirements for admission.

8. Plaintiff presented a college grade point average and Medical College Admission Test scores within the range of such objective intellectual qualifications presented by other applicants accepted for admission to the September 1975 entering class at the school.

9. According to the information summary for The Pritzker School of Medicine furnished by defendants to the Association of American Medical Colleges and published in the *AMCAS Information Booklet for 1975-76 Entering Class*,

"Applicants are selected by the Admissions Committee solely on the basis of their ability, achievement, personality, character and motivation. The Entering Class in 1973 consisted of 104 students, of whom 18 were women, 11 were members of racial minority groups, 10 were Ph.D.'s interested in careers as medical scientists, and 43 were residents of Illinois. 92% of the Entering Class had a GPA [grade point average] over 3.2 and 88% had an average MCAT [Medical College Admission Test] score over 575."

10. On the Medical College Admission Test administered by the Association of American Medical Colleges on October 5, 1974 plaintiff scored as follows: Verbal—605; Quantitative—525; General Information—625; and Science—585, for an average MCAT score of 585.

11. On May 9, 1975 plaintiff graduated from Trinity College, Deerfield, Illinois, receiving her baccalaureate degree

cum laude with a grade point average of 3.6 out of a possible 4.0, such GPA having been 3.46 at the time of her application to the school and 3.53 at the time of initial decision on her application by the school.

12. Plaintiff presented evidence of subjective personal qualifications including reports from pre-medical advisors and instructors who have known plaintiff well, reflecting honesty, intelligence, curiosity, imagination, cooperativeness, friendliness, a willingness to work long hours and other desirable qualities, which, on information and belief, were within the tenor and quality of such subjective personal qualifications presented by other applicants accepted at the school.

13. According to the information summary for The Pritzker School of Medicine furnished by the defendants to the Association of American Medical Colleges and published in the *AMCAS Information Booklet for 1975-76 Entering Class*,

"Applicants over 30 without advanced degrees and foreign citizens without at least one year of completed studies in an American school are not encouraged to apply."³

14. Defendants discriminate against persons over 30 without advanced degrees.

15. Plaintiff is over 30 and without an advanced degree.

16. The ratio of male to female graduate students in the United States under age 30 is disproportionately greater than the ratio of male to female graduate students in the United States over 30.

³ In *Nw. Am. Comp.* "published in *Medical School Admission Requirements 1975-76*,

"In addition to demonstrated academic competence, the Admissions Committee will look for evidence of emotional maturity and motivation for the profession of medicine. Few applicants above the age of 30 are considered; the absolute age limit is 35'."

17. More than 80% of the students entering medical schools in the United States have completed 4 or more years of college and hold baccalaureate degrees.

18. The ratio of male to female students receiving advanced degrees in the United States is disproportionately greater than the ratio of male to female students receiving baccalaureate and first professional degrees in the United States.

19. The percentage of female students for whom the period of lapse from receipt of a baccalaureate degree to the commencement of graduate study is 10 years or more is approximately 2½ times as great as the percentage of male students for whom such lapse is 10 years or more.

20. Current increases in the number of students over 30 notwithstanding current declines in college enrollments generally have been due principally to increased numbers of older women returning to school after meeting family demands upon their time.

21. Students who interrupt their education in order to support a student-spouse or to rear children are disproportionately more likely to be female than male to the point that marriage and rearing of children is the most commonly cited reason for interruption of education by female students and such reason for interruption of education is rarely cited by male students except indirectly among economic reasons generally.

22. Students who interrupt their education in order to support a student-spouse or to rear children or both are disproportionately more likely to be female, over 30 and without an advanced degree when ready and otherwise qualified to apply to a medical school than students who interrupt their education for economic, change of career or area of specialization, or other reasons frequently cited by male students for the interruption of their education.

23. The criterion against persons over 30 without advanced degrees has a disproportionately adverse effect on women on the basis of their sex.

24. The criterion against persons over 30 without advanced degrees has not been shown to predict validly success in The Pritzker School of Medicine or in medical schools or medical practice generally and is not a bona fide occupational qualification reasonably necessary to the normal practice of medicine for The University of Chicago Clinics or hospitals or other employers for whom The Pritzker School of Medicine serves as an employment agency or other source in the hiring and recruitment of doctors of medicine.

25. Alternative criteria which do not have such a disproportionately adverse effect have not been shown to be unavailable.

26. The percentage of women admitted to each class at The Pritzker School of Medicine has been disproportionately smaller than the percentage of women in the general population of the United States or the community served by the school.

27. The percentage of women admitted to each class at The Pritzker School of Medicine has been disproportionately smaller than the percentage of women receiving baccalaureate degrees in the United States or the community served by the school during such year or the preceding year.

28. The percentages of men and women students in each class of the student body of The Pritzker School of Medicine reflects discrimination against women on the basis of sex.

29. By letter dated February 25, 1975 defendant Ceithaml informed plaintiff that the Admissions Committee had completed its consideration of her application and that she was not among the applicants accepted for admission.

30. By letter dated March 5, 1975, plaintiff inquired as to the reason for rejection of her application without an interview notwithstanding the grade point average and Medical College Admission Test scores presented by plaintiff.

31. By letter dated April 10, 1975 defendant Ceithaml informed plaintiff that although her "academic credentials" were good they fell below those of accepted applicants.⁴

32. Upon subsequent telephone inquiry by plaintiff's attorney defendant Ceithaml indicated that the "academic credentials" to which he referred were not the relatively objective credentials of college grade point averages and Medical College Admission Test scores referred to by plaintiff but a more expanded and subjective concept of "academic credentials" which included the policy of discouraging application by persons over 30 without advanced degrees as well as a policy favoring applicants with Ph.D. degrees.

33. The ratio of male to female students receiving Ph.D. degrees in the United States is disproportionately greater than the ratio of male to female students receiving baccalaureate and first professional degrees in the United States and the ratio of male to female students with Ph.D. degrees in the student body of The Pritzker School of Medicine and in each class thereof is disproportionately greater than the ratio of male to female students in such student body or such class thereof.

34. Medical schools other than The Pritzker School of Medicine which express any policy concerning applicants with advanced degrees in their respective information summaries in

⁴ In *Nw. Am. Comp.* "By letter dated December 3, 1974 defendant Berry informed plaintiff that he had reviewed the substance of her application and that her credentials fell somewhat below those of other applicants who would be receiving serious consideration noting that the school policy set a definite upper age limit of 35 years as one of the selection factors." Para. 25.

the *AMCAS Information Booklet for 1975-76 Entering Class* do not favor or affirmatively discourage applicants with advanced degrees, particularly advanced degrees in health science fields.

35. Defendants' policy favoring applicants with Ph.D. degrees has not been shown to predict validly success in the education program or activity of The Pritzker School of Medicine or medical schools generally.

36. By letter dated May 21, 1975 plaintiff's attorney suggested to defendant Ceithaml a re-examination of the reasons for defendants' published policy discouraging applications by persons over 30 without advanced degrees in light of its potential for discrimination against women and requested reference of the matter to the individual or committee charged with particular responsibility for implementing the law and stated policy of the school against sex discrimination.

37. On or about June 18, 1975, Cedric Chernik, Assistant Vice President and Director, Office of Sponsored Programs, responded to plaintiff's attorney by telephone that statements of age preferences by medical schools appeared to be widespread so that the matter might be taken up by the Association of American Medical Colleges but that further inquiry was unnecessary with respect to plaintiff's application to The Pritzker School of Medicine because he had been informed that the policy of discouraging applicants over 30 without advanced degrees was not specifically implemented against persons such as plaintiff who actually applied in spite of the published statement of the discouragement policy in that applications of such persons were not segregated or otherwise formally subjected to special handling in order to effect such policy.

38. On information and belief, no applicant over 30 without an advanced degree has been admitted to the September 1975 entering class and Mr. Chernik was not aware of the admission of any such applicant in recent years or of any

directive, instruction or suggestion that members of the Admissions Committee not implement the published policy discouraging such applicants.

39. Plaintiff and her attorney have brought to the attention of defendants their concern about the failure of defendants to evaluate plaintiff's qualifications other than age and lack of advanced degree.

40. Letters and telephone calls brought to defendant Ceithaml's attention the failure of defendants to allow plaintiff effectively to show that she is fully able to enter The Pritzker School of Medicine in September 1975 and to successfully complete the same and engage in the practice of medicine notwithstanding her age and lack of advanced degree.

41. Plaintiff is now and continually has been intellectually, personally, academically, physically and mentally fit and able to commence, and successfully complete, the study of medicine at The University of Chicago Pritzker School of Medicine.

42. Defendants are acting under color of Illinois law, custom and usage authorizing their conduct of an institution of learning and professional education receiving State and Federal financial assistance to deprive plaintiff of rights secured by the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1871, 42 U.S.C. § 1983, in that:

(a) plaintiff has been involuntarily placed in a class characterized solely on the basis of age and lack of advanced degree and thence subjected to arbitrary and invidious treatment by reason of such classification, in that her application for admission to The Pritzker School of Medicine was denied with the use of such classification as a material criterion, all in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and

(b) plaintiff has been arbitrarily and invidiously discriminated against because her application to The Pritzker School of Medicine has been denied on a basis utilizing age and lack of advanced degree as a material criterion without a personal interview by the Admissions Committee or any due process guarantees or rights to show that there is no sound or reasonable basis to believe such criterion validly predicts any lack of success by her in medical school or practice, all in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

43. Plaintiff is, and has been, qualified for admission to The Pritzker School of Medicine on the basis of her ability, achievement, personality, character and motivation. A material if not the sole criterion for defendants' denial of plaintiff's application for admission to the September 1975 entering class at The Pritzker School of Medicine without an interview by the Admissions Committee was her age and lack of advanced degree which is a criterion disproportionately characteristic of her sex and does not validly predict any lack of success in the education program or activity of the school. This conduct on the part of defendants is in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.*, as amended by Title IX of the Education Amendments of 1972, 20 U.S.C., § 1681(a) which provides:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

and the specific regulations promulgated by the Department of Health, Education and Welfare thereunder, 45 C.F.R. § 86.21(b)(2) which provide:

"A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admis-

sion which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable."

This conduct also is in violation of the written contractual assurances against discrimination on the basis of sex in admissions to The Pritzker School of Medicine filed by or on behalf of defendants with the Secretary for the benefit of plaintiff and other applicants under and pursuant to section 799 of the Public Health Service Act, 42 U.S.C. § 295h-9 as a condition to qualification for and the receipt of payments and other benefits under said Act as well as comparable assurances required under the regulations, 45 C.F.R. § 86.4, promulgated by the Secretary under Title IX of the Education Amendments of 1972 as a condition to continuation of any Federal financial assistance. Plaintiff has exhausted or there are not available in fact administrative procedures for investigation and remedy of said violations claimed by plaintiff.

44. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein. Plaintiff is now suffering and will continue to suffer irreparable injury from the actions of defendants flowing from defendants' denial of her admission to the 1975 entering class at The Pritzker School of Medicine; thereby barring or seriously impeding plaintiff from securing an education at a medical school in Illinois receiving State and Federal financial assistance where she would ordinarily be accorded the preference applicable to her residence in the community served by the school and thereby also barring, delaying or impeding plaintiff from securing employment as a doctor of medicine. This conduct on the part of defendants is in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(b), which provides:

"It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to dis-

criminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age."

Such conduct by defendants also violates and causes the violation by others of the Illinois Act to prohibit unjust discrimination in employment because of age, Ill. Rev. Stat. Chap. 48, § 884, which provides:

"It is an unlawful employment practice for an employer:

* * * *

(2) to utilize in the hiring or recruitment of individuals for employment otherwise lawful, any employment agency, placement service, training school or center, labor organization or any other source which unreasonably discriminates against such individuals because of their age."

Printing and publication of notice of defendants' criterion discouraging persons over 30 without an advanced degree also is in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(e) which provides:

"It shall be unlawful for an . . . employment agency to print or publish, or to cause to be printed or published, any notice or advertisement . . . relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination based on age."

45. The Secretary has obtained and the defendants have furnished assurances satisfactory to the Secretary that The Pritzker School of Medicine will not discriminate on the basis of sex in the admission of individuals to its training programs as required by Section 799 of the Public Health Service Act, 42 U.S.C. § 295h-9. Grants, loans, guarantees or interest subsidy payments under said Act have been made by the Secretary to or

for the benefit of defendants under said Act or the Secretary has entered into a contract with or for the benefit of defendants thereunder. Said written contractual assurances were required and obtained for the benefit of plaintiff and other applicants as third-party beneficiaries. The Secretary has furnished to or for the benefit of defendants the Federal financial assistance given in consideration of said assurances by or on behalf of defendants but the defendants, as alleged herein, have failed to observe or perform their obligations against discrimination on the basis of sex under said written contractual assurances and instead continue to discriminate on the basis of sex in the admission of plaintiff and other individuals to The Pritzker School of Medicine.

46. By letter dated April 18, 1975, plaintiff filed a written complaint with the Secretary and the Regional Director alleging discrimination by defendants on the basis of sex in the denial of her admission to The Pritzker School of Medicine. Although said letter has been acknowledged no investigation or related administrative action has been taken as provided in Subpart F of Part 86 of Title 45, Code of Federal Regulations, incorporating by reference for Title IX of the Education Amendments of 1972, the enforcement procedure for Title VI of the Civil Rights Act of 1964 or as contemplated by the written assurances against such discrimination obtained by the Secretary as required by section 799 of the Public Health Service Act and the Title IX regulations aforesaid.

Relief

WHEREFORE, plaintiff respectfully prays that this Court upon the filing of this complaint advance the plaintiff's cause on the docket and order a speedy hearing thereof, and that this Court enter judgment:

A. granting a preliminary injunction pending final determination of this case prohibiting defendants from

denying plaintiff admission to The Pritzker School of Medicine utilizing the criterion of her age and lack of advanced degree or any other criteria which have not been shown to predict validly success in the education program or activity of The Pritzker School of Medicine or medical schools generally and if any such other criteria shall adversely affect her on the basis of sex, only to the extent that alternative criteria which do not have such adverse effect are shown to be unavailable;

B. granting a preliminary injunction pending final determination of this case prohibiting defendants from continuing to fail and refuse to re-evaluate plaintiff's application and credentials for admission to the September 1975 entering class at The Pritzker School of Medicine in a timely and effective manner, according no weight in such re-evaluation to her age, lack of advanced degree or any other criteria which have not been shown to predict validly success in The Pritzker School of Medicine or medical schools generally, according little, if any, weight in such re-evaluation to relatively subjective criteria, and affording plaintiff reasonable opportunity to challenge effectively other criteria, if any, on which defendants may rely if such re-evaluation shall not result in the timely admission of plaintiff to the September 1975 entering class at The Pritzker School of Medicine;

C. granting a preliminary injunction pending final determination of this case and a permanent injunction upon the final determination of this case prohibiting defendants from continuing to fail and refuse to admit plaintiff to the September 1975 entering class at The Pritzker School of Medicine;

D. declaring that the action of defendants in permitting plaintiff's age or lack of advanced degree or both to

be utilized as material criteria for the denial of plaintiff's application to The Pritzker School of Medicine without any opportunity to challenge effectively the use of any such criteria violated plaintiff's rights against arbitrary and invidious discrimination under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Act of 1871;

E. declaring that the action of defendants in permitting plaintiff's age and lack of advanced degree which is disproportionately characteristic of her sex to be utilized as a material criterion for the denial of plaintiff's application to The Pritzker School of Medicine violated plaintiff's rights against discrimination on the basis of sex under the Civil Rights Act of 1964 as amended by the Education Amendments of 1972 and the contractual assurances obtained by the Secretary for the benefit of plaintiff and other applicants under the Public Health Service Act;

F. declaring that defendants' policy of permitting age or age and lack of advanced degree to be utilized as material criteria for the denial of plaintiff's application to The Pritzker School of Medicine and the printing and publication of notice of such policy violated the Age Discrimination in Employment Act of 1967 and cause The University of Chicago and other Illinois employers of doctors of medicine to violate the Illinois Act to prohibit unjust discrimination in employment because of age in utilizing The Pritzker School of Medicine as an employment agency, placement service, training school or center or other source in the hiring or recruitment of individuals for employment as doctors of medicine while such policy or practice is in effect thereby violating plaintiff's rights against unjust discrimination in employment on the basis of age prohibited by said Acts;

G. granting \$15,000 and such additional damages as plaintiff may incur after the filing of this complaint for refusal by defendants to admit plaintiff to The Pritzker School of Medicine, in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, the Civil Rights Act of 1871, and the Civil Rights Act of 1964, as amended by the Education Amendments of 1972;

H. granting \$15,000 and such additional damages as plaintiff may incur after filing of this complaint for the use by defendants of plaintiff's age and lack of advanced degree to bar, delay or impede her employment as a doctor of medicine, in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, the Civil Rights Act of 1871, the Age Discrimination in Employment Act of 1967 and the Illinois Act to bar unjust discrimination in employment because of age;

I. reasonable attorneys' fees and expenses; and

J. such other or further relief as this Court may deem to be appropriate.

Alternative Relief

In the alternative, plaintiff respectfully prays that this Court enter judgment granting an injunction prohibiting the Secretary and the Regional Director from continuing to fail to investigate promptly and take appropriate related administrative and enforcement actions, including conciliation and efforts to effect voluntary compliance, with respect to plaintiff's administrative complaint to said officials with respect to the

denial of her admission to The Pritzker School of Medicine on the basis of sex.

Respectfully submitted,

JOHN M. CANNON
JAMES A. BURSTEIN
WILLIAM E. SNYDER
Attorneys for Plaintiff

Note: The allegations of the original complaints in each case, verbatim the same as those in the amended and supplemental complaint except with respect to HEW and, in the case of the University of Chicago, the Federal Age Discrimination in Employment Act, were verified as follows:

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

VERIFICATION

GERALDINE G. CANNON being first duly sworn upon oath, deposes and says that she is the plaintiff in the above entitled cause; that she has read the foregoing Complaint, knows the contents thereof and the matters and things therein alleged are true both in substance and in fact.

/s/ GERALDINE G. CANNON

Geraldine G. Cannon

Subscribed and sworn to before me
this day of July, 1975.

[NOTARIAL SIGNATURE AND SEAL]

Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 2402

[Title Omitted]

**MOTION OF DEFENDANTS
TO DISMISS THE COMPLAINT
OR FOR SUMMARY JUDGMENT**

Defendants, by their attorneys, move to dismiss the complaint or for summary judgment on the following grounds:

(a) the Court lacks jurisdiction over the subject matter of the complaint; jurisdiction is claimed under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Education Amendments of 1972, 20 U.S.C. § 1681; defendant The University of Chicago is a private educational institution and insufficient state action has been alleged or in fact exists to bring the action complained of within the purview of 42 U.S.C. § 1983; The Education Amendments of 1972 create no private rights which may be vindicated by direct judicial action;

(b) the complaint fails to state a claim upon which relief can be granted;

(c) defendants are entitled to judgment as a matter of law; the gist of the complaint is that the policy manifest in the statement respecting The University of Chicago Pritzker School of Medicine appearing in the Association of American Medical Colleges Information Booklet that applicants over 30 without advanced degrees are not encouraged to apply discriminates on the basis of sex against plaintiff, a female over 30 without an advanced degree, because, it is alleged, relatively fewer women than men

over 30 have advanced degrees; the facts are that plaintiff's application for admission to the Pritzker School of Medicine was considered on its merits and was eliminated from further consideration solely because of plaintiff's academic record and her Medical College Admission Test scores; sex, age, and lack of advanced degree were not factors in the screening of plaintiff's application; there is no genuine issue as to any material fact.

Defendants submit herewith and in support of this motion affidavits of WALTER V. LEEN, Secretary of the Board of Trustees of The University of Chicago and general counsel of The University of Chicago; HAROLD E. BELL, Vice President-Comptroller of The University of Chicago; and JOSEPH CEITHAML, DEAN OF STUDENTS, DIVISION OF THE BIOLOGICAL SCIENCES AND THE PRITZKER SCHOOL OF MEDICINE.

Respectfully submitted,

STUART BERNSTEIN,
MICHAEL F. ROSENBLUM,
SUSAN S. SHER,

Attorneys for defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 2402

[Heading Omitted]

AFFIDAVIT OF JOSEPH CEITHAML

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

JOSEPH CEITHAML, being first duly sworn, on oath deposes and says:

1. I am one of the named defendants in the above-entitled action. I am the Dean of Students in The University of Chicago Division of the Biological Sciences and the Pritzker School of Medicine ("the Medical School") and Professor of Biochemistry. I am the Director of Admissions and a member of the Committee on Admissions to the Medical School. I participate in deliberations leading to the selection, advancement and graduation of students. I have been Dean of Students and a member of the Committee on Admissions for the past 25 years. I have full knowledge of the facts set forth herein.

2. The number of students who can be admitted to the Medical School is limited by laboratory facilities, material and equipment, and faculty. These limitations are specifically evident in the gross anatomy, histology, and neurobiology courses in the first year of study, and in the general pathology and clinico-patho-physiology courses in the second year of study. The administration of the Medical School, in consultation with the faculty, has determined that the maximum number of students that can

be admitted to the Medical School each year within the limits of existing facilities is 104, and the Committee on Admissions, which is responsible for the selection of students for admission to the Medical School, has been so instructed. Precisely 104 students have been admitted as first year students each year since 1972.

3. The Committee on Admissions is composed of ten members of the faculty of the Medical School. The general requirements for admission to the Medical School, procedures for admission and selection policy are set forth in a bulletin which is sent on inquiry to any potential applicant and is sent as a matter of course to all applicants. A copy of this bulletin is attached hereto as Exhibit A. This bulletin includes the following statement:

"The Committee believes that questions of race, religion, sex, national origin, or geographic location are not valid criteria for the selection of students; therefore, these factors have no bearing on the consideration of any applicant."

The bulletin further states:

"... The admission procedure involves first a preliminary screening of all applicants on the basis of their intellectual qualifications. This is done to insure, in so far as is possible, that all applicants selected are capable of maintaining high academic standards. The student's scholastic record, along with his Medical College Admission Test scores, are used in this procedure."

4. All applicants for admission to the Medical School must meet the minimum qualifications for admission as set forth in the attached bulletin. The function of the Committee on Admissions is to select from among the applicants those best qualified for admission. The number of applicants for admission and the number selected for

admission, by sex, for the academic years 1972 to and including 1975 is as follows:

	Applicants			Admitted		
	Female	Male	Total	Female	Male	Total
1972	543	3,465	4,008	17	87	104
1973	765	4,054	4,819	18	86	104
1974	996	4,157	5,153	22	82	104
1975	1,172	4,154	5,427*	19	85	104

* 101 applications did not indicate sex.

5. To assist the Committee on Admissions in evaluating the Medical College Admission Test ("MCAT") scores, one of the criteria relied upon in the preliminary screening described in paragraph 3 above, the scores of all applicants to the Pritzker School of Medicine are ranked with respect to each other on a decile scale. Decile 1 signifies that the score is in the highest ten percent bracket of all applicant scores; decile 2 signifies that the score is within the second ten percent bracket, *i.e.*, that from 11% to 20% of all other scores are higher than those within decile 2.

6. The application of plaintiff Geraldine G. Cannon was eliminated at the preliminary screening described in paragraph 3 above upon examination by two members of the Committee on Admissions, one of whom was me. The two Committee members acted independently in arriving at the decision. My decision was based on the following factors:

The grade point average of Ms. Cannon as an undergraduate student in the critical area of basic science (which includes chemistry, biology, physics and mathematics) was 3.17 out of a possible 4. By way of comparison, the average grade point average in basic science for the entering class of 1974 was 3.7.

The MCAT score of Ms. Cannon in science was in decile 6, *i.e.*, from 51% to 60% of all other applicants to the Medical School had higher science test scores.

The MCAT score of Ms. Cannon in Quantitative Ability (mathematical skills) was in decile 9, *i.e.*, from 81% to 90% of all other applicants to the Medical School had higher mathematics test scores.

7. None of the factors of Ms. Cannon's age, sex and lack of advanced academic degree entered into my decision regarding the elimination of her application at the preliminary screening. This decision was based solely on the criteria described in the attached bulletin as set forth in paragraph 3 above.

8. The Committee on Admissions received 5,427 applications for the 104 places available for the class entering the Medical School in the fall of 1975. Of those applicants not offered an acceptance, there were at least 2,000 who had better academic qualifications than did Ms. Cannon.

9. By letter dated on or about February 19, 1975, Ms. Cannon was advised that she was not among the applicants accepted for admission to the Medical School. A copy of the form of letter sent to her is attached hereto as Exhibit B. By letter dated March 5, 1975, Ms. Cannon wrote to me inquiring as to the reason for this decision. A copy of this letter is attached as Exhibit C. I replied to this inquiry by letter dated April 10, 1975. A copy of this letter is attached hereto as Exhibit D.

10. Neither the State of Illinois nor any agency of the State of Illinois has participated in or influenced, or attempted to participate in or influence, the Committee on Admissions in the establishment of criteria for admission to

the Medical School or the selection of applicants for admission to the Medical School.

/s/ JOSEPH CEITHAML

Joseph Ceithaml

Subscribed and sworn to before me this day of
 , 1975.

[NOTARIAL SIGNATURE AND SEAL]

 Notary Public

THE UNIVERSITY OF CHICAGO

THE PRITZKER SCHOOL OF MEDICINE

INTRODUCTION

The University of Chicago Pritzker School of Medicine provides for its students a rigorous and excellent program of studies designed to prepare its graduates for distinguished careers in medicine. Emphasis is placed on the scientific basis of medicine and on the skillful application of scientific principles to human problems. In order to maintain a high ratio of teachers to students, thus insuring for the latter a maximum of individual attention, each entering class is limited to 104 students. Those who manifest interest and aptitude in research are encouraged in this direction and are afforded opportunities and facilities to engage in investigation under proper supervision of sponsorship. These research opportunities can be arranged along with the regular medical studies by utilizing elective time and summer vacations, or may be scheduled in continuous periods of a year or more intervening between regular terms of medical study.

The School of Medicine, established in 1927, is unique in several respects. First, located with its hospitals and basic science laboratories on the campus of the University, it is an integral part of the Division of Biological Sciences. This arrangement permits medical students to take course work in related fields in addition to their medical school work if they so wish. The medical curriculum permits, but does not require, participation by the student in research activities.

The medical school offers a variety of M.D./Ph.D. programs of study to its students. All of these programs combine the breadth of an excellent medical education with the depth of

a rigorous graduate research program. Usually a student first completes 1 or 2 years of medical studies before embarking on a dual degree program. These various M.D./Ph.D. programs usually require 6 calendar years of study.

Second, students receive their clinical training primarily in the University Hospitals, ten interconnected units with a total bed capacity of 670. Finally and perhaps most significantly, the University of Chicago Pritzker School of Medicine is the only medical school in the country with a completely full-time clinical teaching staff in its University Hospitals where every one of the clinical teachers devotes all of his time to teaching medical students, to the care of patients, and to medical research. This constant presence of the clinical teaching staff under the full-time plan provides unusual opportunities for intensive training at the bedside and for the development of a close teacher-student relationship. Students are eligible to do clinical work at Michael Reese Hospital, which is affiliated with the Pritzker School of Medicine.

REQUIREMENTS FOR ADMISSION TO

THE PRITZKER SCHOOL OF MEDICINE

A prospective medical student must have a good foundation in general education including work in the social sciences, humanities, mathematics, physical sciences and biological sciences. Besides securing an understanding of the general principles in the various fields of knowledge and of their respective contributions to our cultural heritage, applicants must also fulfill a minimum number of specific science prerequisites which provide the scientific concepts and information upon which medical studies are based. The student is not required to have mastered a foreign language or to have taken advanced science courses, although study in depth in any specialized field of knowledge, scientific or non-scientific will

make the student a more desirable applicant. Moreover, for students interested in research, courses in the calculus, genetics, physical chemistry, analytical chemistry, statistics and the like are especially desirable. However, such advanced courses are recommended only when they are not taken at the expense of an adequate background in the non-science areas. The specific requirements for admission include:

1. No less than three academic years of college (a minimum of 90 semester hours or 135 quarter hours). This must include:

	Semester Hours
(a) *Chemistry (including general and aliphatic and aromatic organic)	16
*Biology (including at least 8 semester hours with laboratory)	12
*Physics (with laboratory)	8
(b) *Studies in social sciences, humanities, English composition, and mathematics.	

* Advanced standing which has been officially granted to an applicant by his college in any of these subjects will be recognized by our Committee on Admissions as partially fulfilling these requirements for admission.

2. Medical College Admissions Test. This test is required of all applicants. It is administered by The American College Testing Program, Post Office Box 451, Iowa City, Iowa 52240. Arrangements for taking this test should be made by the student through his premedical advisor or directly with The American College Testing Program. The test is given nationally once in the spring and again in the autumn.

PROCEDURE FOR ADMISSION

Since the medical school participates in the centralized application service, a student seeking admission to the Pritzker School of Medicine must apply through the American Medical

College Application Service (AMCAS). Applicants may secure AMCAS application request forms from their premedical advisors or from our medical school's Dean of Students Office. After the application form has been completed, it should be sent to AMCAS which will process the application and then forward a copy of it to the medical school. A University of Chicago Supplementary Application will then be automatically sent to the applicant. Official transcripts should be sent directly to AMCAS. Transcripts should not be sent to our Dean of Students Office unless requested by the Committee on Admissions. Letters of recommendation should be requested by the applicant to be sent to the medical school. The applicant's file is not complete until both applications with all questions answered fully, and all materials requested, including letters of recommendation, have been received. When complete, the application file is referred to the Dean of Students for consideration by the Committee on Admissions to the Medical School. Applications should be on file approximately twelve months before the desired time of admission. Our deadline for filing an AMCAS application is November 30. Applicants are usually notified of the final action of the Committee some time between November and April.

At the time an applicant is selected for admission and has paid his deposit to reserve a place in the next entering class, he will be sent a health history form to fill out. After he completes his college studies, he will be requested to provide an official transcript of his entire college academic record. Then during orientation week in the autumn, there will be a health survey and physical examination of each member of the class by the Student Service of the University of Chicago.

SELECTION POLICY

The number of qualified applicants for admission to the Pritzker School of Medicine greatly exceeds its facilities. Therefore, all applicants cannot be admitted, even though their

records may meet the specified requirements. The responsibility of the Committee on Admissions is to select from among the many hundreds of applicants those who are best qualified for, and who will benefit most by, the program of medical education in this school. The Committee strives to make its decision on the basis of the ability, achievement, personality, character, and motivation of the candidates. The Committee believes that questions of race, religion, sex, national origin, or geographic location are not valid criteria for the selection of students; therefore, these factors have no bearing on the consideration of any applicant.

In actual practice, the admission procedure involves first a preliminary screening of all applicants on the basis of their intellectual qualifications. This is done to insure, in so far as possible, that all applicants selected are capable of maintaining high academic standards. The student's scholastic record, along with his Medical College Admission Test scores, are used in this procedure. From the group of applicants judged capable of meeting the academic standards of the School, final selection is made on the basis of the personal qualifications of the applicants. Honesty, intellectual curiosity, imagination, cooperativeness, friendliness, and a willingness to work long hours are a few of the desired qualities. Participation in college extracurricular activities, including athletics, often represents a desirable attitude in applicants and frequently indicates their ability to work co-operatively. Since no tests can measure adequately the personal qualifications of an applicant, the Committee relies heavily upon the reports from premedical committees, premedical advisors, instructors, and others who may know the student well and who write to us on his behalf. The proper selection of applicants is of significance not only to the University of Chicago but to the public as well.

Whenever it seems desirable, arrangements are made for the applicants to have personal interviews with members of the faculty of the School of Medicine or with its representatives

located in various parts of the country. Such interviews are arranged by the Committee on Admissions and are not the responsibility of the applicant.

Since a student need not have completed all the pre-medical requirements in order to have his application considered by the Committee on Admissions, an admission offer is always contingent upon the successful completion of academic work in progress and the continued maintenance of a satisfactory scholastic record. A student who has not completed all his required premedical courses at the time he submits his application must have a plan for completing them before the beginning of work in the next entering freshman medical class.

SELECTIVE SERVICE POLICY

Any applicant offered a place in our medical school, upon his request to the Registrar of the University of Chicago, may secure a certified statement of his acceptance which he may then send to his Local Selective Service Board, if he so wishes.

MEDICAL PROGRAM

One class consisting of 104 students, is admitted each year in the Autumn Quarter, starting in September. Students will normally be graduated 45 months after matriculation. Students are in residence three of the four quarters the first two years and all four quarters in the final two years. The fourth year is completely elective and constitutes a culminating year of medical studies in which each student, with guidance provided by the teaching staff, plans his senior year of elective studies in accordance with his own individual academic needs and career goals. Entering medical students interested in applying for scholarship aid may do so only after receiving notification of

acceptance. Scholarship stipends vary according to the financial need of the applicant. Interest-free loans are also available to aid those students desirous of a medical education who do not have sufficient funds to finance it. Our policy is to select students with great care and then to do everything possible to help them complete their medical education.

JOSEPH CEITHAML
Dean of Students
 The Pritzker School of Medicine
 950 East 59th Street
 Chicago, Illinois 60637

Exhibit B

[HEADING OMITTED]

Our Committee on Admissions has completed its consideration of your application for admission to our School of Medicine. We are sorry to inform you that you were not among the applicants selected for admission. The Committee regrets that it can accept only a limited number of medical students each year from among the large numbers of students who apply. Our action is not intended to discourage your interest in further study, and we hope you will be successful in gaining admission elsewhere.

Sincerely yours,

 JOSEPH CEITHAML

Joseph Ceithaml
Dean of Students
 Biological Sciences

JC/iuh

Exhibit C

2420 The Strand
 Northbrook, Illinois 60025

March 5, 1975

Dr. Joseph Ceithaml
 University of Chicago
 The Pritzker School of Medicine
 950 East 59th Street
 Chicago, Illinois 60637

Dear Dr. Ceithaml:

I was disappointed to receive your letter concerning my application to the University of Chicago Pritzker School of Medicine because my college grade point average and MCAT scores appeared to be well within the published range for such academic qualifications.

I would appreciate knowing of the reasons for the decision.

Yours very truly,

GERALDINE CANNON

Exhibit D

April 10, 1975

Mrs. Geraldine Cannon
2420 The Strand
Northbrook, Illinois 60025

Dear Mrs. Cannon:

In response to your letter of March 5, 1975 I regret to inform you that although your academic credentials were good they fell far below the level of the accepted students in our next entering medical class. Annually the competition for places in our entering class is extremely keen and this year was no exception for we had in excess of 5,400 applicants for the 104 places we had to offer.

In closing I appreciate your desire to study medicine and I am sorry that you did not qualify for a place in our entering class.

Sincerely yours,

JOSEPH CEITHAML
Dean of Students
Biological Sciences

JC:ems

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Civil Action

No. 75 C 2402

[Title Omitted]

**MOTION OF DEFENDANTS TO DISMISS THE
AMENDED AND SUPPLEMENTAL COMPLAINT OR, IN
THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Defendants, by their attorneys, move to dismiss the amended and supplemental complaint or, in the alternative, for summary judgment, on the following grounds:

(a) Jurisdiction is claimed under (i) the Civil Rights Act of 1871, 42 U.S.C. § 1983, (ii) the Education Amendments of 1972, 20 U.S.C. § 1681, and (iii) the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(c). The Court has previously determined that the initial complaint filed herein, which claimed jurisdiction under (i) and (ii) above, be dismissed for want of jurisdiction. The amended and supplemental complaint presents no additional material which brings this action within the purview of the Civil Rights Act of 1871; the Court has previously held that The Education Amendments of 1972 do not create a private right of action. The Court, therefore, lacks subject matter jurisdiction with respect to the claims under the Civil Rights Act of 1871 and The Education Amendments of 1972.

(b) The amended and supplemental complaint fails to state a claim upon which relief can be granted with respect to the claim of jurisdiction under the Age Discrimination in Employment Act of 1967. That Act is

applicable only to claims of discrimination in employment and the amended and supplemental complaint makes no allegation that plaintiff has sought and been denied employment with or through defendants. To the contrary, the basis of the complaint is that plaintiff has been denied admission as a student to the Pritzker School of Medicine of The University of Chicago, a claim not within the purview of the Age Discrimination in Employment Act.

(c) Alternatively, defendants are entitled to judgment as a matter of law; the gist of the complaint is that the policy manifest in the statement respecting The University of Chicago Pritzker School of Medicine appearing in the Association of American Medical Colleges Information Booklet that applicants over 30 without advanced degrees are not encouraged to apply discriminates on the basis of sex against plaintiff, a female over 30 without an advanced degree, because, it is alleged, relatively fewer women than men over 30 have advanced degrees; the facts are that plaintiff's application for admission to the Pritzker School of Medicine was considered on its merits and was eliminated from further consideration solely because of plaintiff's academic record and her Medical College Admission Test scores; sex, age, and lack of advanced degree were not factors in the screening of plaintiff's application; there is no genuine issue as to any material fact.

In support of this motion, defendants submit by reference the affidavits previously filed herein on August 18, 1975, of WALTER V. LEEN, Secretary of the Board of Trustees of The University of Chicago and general counsel of The University of Chicago; HAROLD E. BELL, Vice President-Comptroller of The University of Chicago; and JOSEPH CEITHAML, Dean of Students, Division of the Biological Sciences and the Pritzker School of Medicine.

Respectfully submitted,

STUART BERNSTEIN,
MICHAEL F. ROSENBLUM,
SUSAN S. SHER,
Attorneys for defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

75 C 2724

[Title Omitted]

**MOTION OF DEFENDANTS
TO DISMISS COMPLAINT**

Defendants, by their attorneys, move to dismiss the complaint on the grounds that it fails to state a claim upon which relief may be granted and that the Court lacks jurisdiction over the subject matter. In support of their Motion, defendants herewith submit a Memorandum.

WILLIAM H. THIGPEN
THOMAS H. MORSCH
LAWRENCE I. KIPPERMAN

By _____
One of the Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 2724

[Title Omitted]

**MOTION OF DEFENDANTS TO DISMISS
THE AMENDED AND SUPPLEMENTAL COMPLAINT**

Defendants, by their attorneys, move to dismiss the Amended and Supplemental Complaint on the grounds that it fails to state a claim upon which relief may be granted and that the Court lacks jurisdiction over the subject matter.

WILLIAM H. THIGPEN
THOMAS H. MORSCH
LAWRENCE I. KIPPERMAN

By _____
One of the Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Civil Action

No. 75C 2402

[Title Omitted]

A N S W E R

Now comes the defendant, the United States Department of Health, Education, and Welfare answering the complaint previously filed herein and states as follows:

1. With respect to the allegations contained in paragraph 1, relating to the statutory authority cited, to invoke the jurisdiction of this Court, defendant does not admit to the jurisdiction as alleged under Title 28 United States Code sections 1331, 1343(3), 1343(4), 1345, 1346, 2201 and 2202.

(i) The defendant asserts that allegations contained in the amended and supplemental complaint do not establish the requisite state action necessary to grant jurisdiction to this court under the Civil Rights Act of 1871, Title 42 U.S.C., section 1983 as the court so held in its decision on the original complaint of September 11, 1975.

(ii) The defendant further asserts that the Civil Rights Act of 1964, Title 42 U.S.C. section 2000c-6 and 2000c-8 as amended by Title 9 of the 1972 Education Amendment does not give jurisdiction to this court of the subject matter. Under Title 9 as well as Title 6, judicial review of the Department's action is provided for after a final decision has been made on a

complaint filed with the Office of Civil Rights. An investigation of the complaint, a hearing and a final determination to terminate the federal assistance being received by the educational institution must precede the right to judicial review. Section 799 of the Public Health Service Act, Title 42 U.S.C. section 295h-9 requires assurances of nondiscrimination in any program of a recipient of federal assistance and therefore incorporates by reference the administrative procedure set forth in Titles 6 and 9 that must be pursued before the right to judicial review is available.

(iii) Defendant further denies that jurisdiction is invoked by section 7(c) of the Age Discrimination In Employment Act of 1967, Title 29, U.S.C. section 626(c) due to the fact that no finding of age discrimination has been made as of yet by the Secretary of the Department of Health, Education, and Welfare on the plaintiff's complaint.

(iv) Defendant also denies the allegation contained in the same paragraph that the Administrative Procedure Act, Judicial Review, Title 5 U.S.C. sections 702 and 703 can convey jurisdiction on this court because there *is* a "prior, adequate" specified statutory review proceeding available to the plaintiff in connection with the action taken by Health, Education, and Welfare and until final agency action has been taken, no judicial review is possible. In addition agency action is defined in section 704 of the Administrative Procedure Act as being final unless there is a different interpretation required by statute. Agency action on a charge of discrimination pursuant to Title 9 is not considered final until all the administrative steps cited above have been concluded. These administrative steps have not been completed at this time.

2. Defendant has no specific information as to the truth or falsity of the allegations contained in the plaintiff's paragraphs 2 to 4 and therefore demand strict proof of the same.

5. The defendant admits the allegation contained in plaintiff's paragraph 5 as the same relates to the Hon. David Matthews and Kenneth A. Mines individually and in their official capacities as Secretary of the Department of Health, Education, and Welfare and Regional Director of the office for Civil Rights. However, defendant does not have sufficient knowledge to respond to the allegation contained in the same paragraph as it relates to the other named defendants, individually and in their official capacities as officers and employees of the Pritzker School of Medicine, of the University of Chicago and therefore demand strict proof of the same.

6. Defendant has no specific information as to the truth or falsity of the allegations contained in plaintiff's paragraphs 6 through 42 and therefore demand strict proof of the same.

43. Defendant has no specific information as to the truth or falsity of the allegations contained in plaintiff's paragraph 43 because there has not been an investigation of the plaintiff's complaint from which a finding can be made of discrimination in violation of Title 9 and section 799 of the Public Health Service Act.

44. Defendant denies the allegation contained in plaintiff's paragraph 44 as it relates to the lack of a plain, adequate or complete remedy at law to redress the alleged wrongs complained of by plaintiff in her brief. Defendant further asserts that the Department of Health, Education, and Welfare is authorized under the 1972 Civil Rights Act as amended to provide an administrative procedural remedy to any individual who has filed a complaint of sex

discrimination with the Office of Civil Rights. The remedy provided under the Act includes investigation of a filed complaint, a finding on the discriminatory charges, a hearing and a termination of federal funding if voluntary compliance is not forthcoming from the education institution found to be in violation of the Act.

Despite the failure of Office of Civil Rights of the Department of Health, Education, and Welfare to act promptly on plaintiff's complaint, such delay is not evidence of a lack of remedy being available to plaintiff but is nothing more than the agency's administrative delay in acting on a complaint. However, defendant does not have sufficient knowledge to respond to other allegations contained in paragraph 44 as the same relates to the irreparable injury suffered by the plaintiff due to the lack of an investigation by the Department of Health, Education, and Welfare on plaintiff's complaint.

45. Defendant has no specific information as to the truth or falsity of the allegation contained in plaintiff's paragraph 45 as it relates to grants or loans made by the Secretary of Health, Education, and Welfare on the strength of assurances given by the recipient educational institution to refrain from discrimination in the conduct of its programs due to the lack of an investigation of plaintiff's charges.

46. Defendant admits to the allegations contained in plaintiff's paragraph 46 as the same relates to the Department's failure to promptly investigate the sex discrimination complaint, filed on April 18, 1975. However, defendant does deny each and every allegation contained in the same paragraph as it relates to plaintiff's present inability to obtain an administrative remedy from Health, Education, and Welfare. Although said defendant has failed in the past to accord plaintiff a swift response to her

complaint, such failure was due to an administrative decision made by the Secretary to suspend Title 9 investigations because federal regulations necessary to implement the 1972 Educational Amendments to the Civil Rights Act were in the process of being revised at that time.

WHEREFORE, the defendants ask that the alternative prayer for an injunction be denied and the case be remanded to the Secretary of Health, Education, and Welfare for the purposes of conducting a prompt investigation of the sex discrimination charge and to take further appropriate administrative action deemed necessary to lead to a final determination on the case by the Department.

Respectfully submitted,

SAMUEL K. SKINNER
United States Attorney

[HEADING OMITTED]

December 22, 1975

Frederick H. Branding, Esq.
Assistant U. S. Attorney
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Cannon v. Univ. of Chicago, et al.*
75 C-2402

Dear Mr. Branding:

This will confirm our telephone conversation of Friday afternoon, December 19, 1975, in which you informed me that Mr. Kenneth A. Mines, Regional Director of the Office for Civil Rights of the Department of Health, Education & Welfare, proposes to conduct the administrative investigation in the above matter during the first half of January, 1976.

This will also confirm my response to you that in view of Mr. Mines' proposal as to the timing of such investigation, I shall refrain from presenting a motion that the court order the same prior to January 16, 1976.

Thank you for your efforts in moving this matter along.

Very truly yours,

JOHN M. CANNON

JMC:GD

cc: Hon. Julius J. Hoffman
Stuart Bernstein, Esq.

* A substantially identical letter was written in the Northwestern case.

The following documents are reprinted in their entirety in the Appendix attached to the Petition for Certiorari as follows:

	<u>Page</u>
	(App. Pet. Cert.)
Judgment of the Court of Appeals	A-1
Opinion of the Court of Appeals filed August 27, 1976	A-2
Rehearing Opinion of the Court of Appeals filed August 9, 1977	A-22
Letter from HEW dated June 2, 1976	A-35
Opinion of HEW Departmental Counsel dated September 17, 1974	A-37

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 3, 1977.

Before

Hon. THOMAS E. FAIRCHILD, Chief Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

Nos. 76-1238, 76-1239

GERALDINE G. CANNON,

Plaintiff-Appellant,

vs.

THE UNIVERSITY OF CHICAGO, et al.,

NORTHWESTERN UNIVERSITY, et al.,

Defendants-Appellees.

} On Petition for Rehearing

ORDER

Plaintiff-appellant has currently pending before the Court a petition for rehearing of the panel's decision on rehearing, a suggestion for a rehearing en banc of the panel's original decision, and a suggestion for rehearing en banc of the panel's decision on rehearing regarding the question of whether appellant has stated a claim to relief under Title IX of Public Law No. 92-318.

On consideration of the petition for rehearing, all the judges on the original panel have voted to deny rehearing.

* The Hon. Robert A. Grant, United States District Court for the Northern District of Indiana, is sitting by designation.

No judge in active service has requested a vote on appellant's suggestion for rehearing en banc of the entire case.

On consideration of the suggestion for rehearing en banc of the Title IX issue addressed in the panel's opinion on rehearing, a vote of the active members of the Court was requested, and a majority of the Court has voted to deny a rehearing en banc.**

Accordingly, IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

** Chief Judge Fairchild and Judge Swygert voted to grant rehearing en banc of the Title IX issue.

JAN 27 1978

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-926

GERALDINE G. CANNON,

Petitioner,

vs.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

GERALDINE G. CANNON,

Petitioner,

vs.

NORTHWESTERN UNIVERSITY, ET. AL.,

Respondents.

**JOINT BRIEF OF RESPONDENTS THE UNIVERSITY OF
CHICAGO AND NORTHWESTERN UNIVERSITY
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

Of Counsel:

MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,

ALLISON DUNHAM,
The University of Chicago,
Chicago, Illinois 60637.

STUART BERNSTEIN,
SUSAN S. SHER,

*Attorneys for The University
of Chicago, et al.*

Of Counsel:

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QUESTION PRESENTED.

Title IX of the Education Amendments of 1972 (86 Stat. 373-75; 20 U. S. C. § 1681, *et seq.*) declares that no person shall be subject to discrimination on the basis of sex in any federally assisted education program. Effectuation and enforcement of Title IX is delegated to the Department of Health, Education and Welfare; agency action is subject to judicial review. No private right of action is provided. Was the court below correct in concluding that no private right of action could be inferred and that federal administrative enforcement followed by judicial review is the exclusive remedy?

STATUTE INVOLVED.

The Petition does not include those sections of Title IX relating to federal administrative enforcement and judicial review. The relevant sections are set forth in an appendix to this brief. These are 20 U. S. C. §§ 1681-83 (Sections 901-3, Title IX of the Education Amendments of 1972, Public Law 92-318, 86 Stat. 373-75).

STATEMENT OF THE CASE.

Petitioner applied for admission to the 1975 entering class of the six medical schools in Illinois. After her application was rejected by all, she filed administrative complaints with HEW alleging sex discrimination in the denial of her applications.

Shortly thereafter, she brought the instant suit against respondents, The University of Chicago and Northwestern University, alleging a violation of Title IX. Petitioner's allegations were premised solely upon an inference drawn from an allegation of age discrimination. The gist of her complaint was that the medical schools discouraged application by persons over 30—as was petitioner—and that this had an adverse impact on females.

The requested relief included, *inter alia*, an injunction requiring her admission. An amended complaint added as parties the Secretary of HEW and the Regional Director of the Office of Civil Rights of HEW.

Petitioner also alleged violations of her 14th amendment rights under the Civil Rights Act of 1871, 42 U. S. C. § 1983; § 799A of the Public Health Services Act, 42 U. S. C. § 295h-9, and the Age Discrimination in Employment Act, 29 U. S. C. § 621 *et seq.*

The Court of Appeals affirmed the district court's ruling that petitioner had failed to state a claim under any of these statutes. Cert. Pet. A. 2-21. Rehearing was then granted on the sole question of "whether, in the circumstances of this case, a private cause of action lies under Title IX of Public Law 92-318."¹

Upon reexamination of the reasons for its granting the petition for rehearing—the impact of the then recently enacted Civil Rights Attorney's Fees Award Act of 1976 and its earlier reading of *Lau v. Nichols*, 414 U. S. 563 (1974)—the Court of Appeals reaffirmed its initial decision. Cert. Pet. A. 22-34.

A petition for rehearing *en banc* on all jurisdictional grounds asserted in the complaint was subsequently denied. The petition for certiorari presents only the Title IX issue.

1. To this point in the litigation, the federal respondents—the Secretary of HEW and the Regional Director of the Office of Civil Rights of HEW—had vigorously supported the position of the University respondents that there was no private right of action under Title IX, and had filed a memorandum opposing the petition for rehearing. The federal respondents then, without explanation, reversed their position, withdrew their memorandum opposing rehearing and thenceforth just as vigorously supported the position of petitioner. As the Court of Appeals noted, HEW never explained why it no longer believed, as it once had told the court, that "Title IX's administrative procedural remedies were meant to suffice in enforcing Title IX's prohibitions against sex discrimination." Cert. Pet. A. 28.

ARGUMENT.

1. Introduction.

Petitioner was one of 5427 who applied for the 104 positions available in the 1975 entering class at The University of Chicago Pritzker School of Medicine. Cert. Pet. A. 3. Although petitioner states she had higher academic qualifications than a substantial number of the accepted applicants (Cert. Pet. 4, 13), this claim is unsupported by the record and, in fact, is directly contradicted. The record discloses that her Medical College Admission Test Score in mathematical skills placed her in the lowest 20% of the applicant group; her science score placed her in the lower half of the applicant group. The Dean of Students stated in an affidavit of record that there were at least 2,000 unsuccessful applicants with better academic qualifications than petitioner. Cert. Pet. A. 3.

Petitioner alleged that the admission policies had an adverse impact on females. The fact is that over the four years 1972-75, 18.1% of the applicants and 18.3% of the entering classes have been female.² Cert. Pet. A. 3.

The issue here is not whether petitioner was academically qualified. However, her relatively low academic standing among the 5427 applicants illustrates the potential burden this case represents. For if petitioner prevails on the jurisdictional issue presented here, then every disappointed applicant, male or female, of whatever race, for admission to a private educational institution of higher learning which receives federal assistance (and that includes virtually every one), could require the admissions committee of that school to justify in court its decision respecting the applicant by merely alleging race or sex discrimination. The effect of a finding that Title IX permits an individual

2. These statistics apply to The University of Chicago. The admission practices at Northwestern University are similar. Cert. Pet. A. 3, n. 2. Northwestern University had stated in a letter to petitioner, referred to in the amended complaint, that the ratio of acceptances to applicants was about 1 to 80.

private right of action is to make the trial court the admissions committee. For a claim by an applicant such as petitioner cannot be determined without considering the relative qualifications of all those against whom she has competed—including the 2000 unsuccessful applicants to the University of Chicago Pritzker School of Medicine whose qualifications were superior to hers. And if the trial court should determine that petitioner is deserving, then it must decide which of the 104 successful applicants should be displaced.

If Congress had clearly stated in Title IX that this enforcement procedure was intended, then, however onerous the burden, such a procedure would have to be followed. But such an intent ought not be lightly inferred.

Here the Court of Appeals found that “in the face of the carefully constructed scheme of administrative enforcement contained in the Act,” no private right of action could be inferred. Cert. Pet. A. 14.

“Considering our already overburdened [judicial] system we fail to see why we should stretch a statute by judicial interpretation to the point where it would allow additional litigation which we may not be able to properly accommodate.” Opinion, Court of Appeals, Cert. Pet. A. 17.

The language and history of the statute and prior decisions of this Court clearly support the conclusion of the Court below. Neither *Lau v. Nichols*, 414 U. S. 563 (1974), nor the Civil Rights Attorney’s Fee Award Act of 1976, 42 U. S. C. § 1988, implies a different result.

2. The Statutory Scheme.

Title IX “authorizes and directs” HEW—the agency empowered to extend federal aid to educational institutions—to “effectuate” the nondiscrimination purposes of the Title through “rules, regulations, or orders of general applicability.” 20 U. S. C. § 1682.

The statute encourages voluntary compliance in the first instance, an opportunity for an administrative hearing on the issue of discrimination if necessary, and the withdrawal of federal funds as a last resort for a recalcitrant institution which has been found to discriminate in violation of the Act. 20 U. S. C. § 1682. After "department or agency action taken pursuant to § 1682" there is a right to judicial review. 20 U. S. C. § 1683. Not only is no direct private action contemplated, but Congress made clear in Title IX itself that no action of any type is permissible until "the department or agency concerned has advised the appropriate person or persons of the failure to comply with the [substantive] requirements [of Title IX] and has determined that compliance cannot be secured by voluntary means." 20 U. S. C. § 1682.³

The legislative history of Title IX supports a plain reading of the Title. It was intended to "require hearings and notice, and the normal administrative procedures are set out."⁴

3. The procedure to be followed is further detailed in regulations issued by HEW. (45 C. F. R. § 86.71.) Pursuant to these regulations, any person alleging discrimination may file a complaint with HEW. HEW in turn is required to inform the institution involved, investigate the complaint, and attempt to resolve the matter informally if it finds discrimination. (45 C. F. R. § 80.7.) The regulations emphasize the importance of attempting voluntary compliance with the nondiscrimination requirements of the statute in requiring that HEW seek cooperation from recipients and provide assistance and guidance in order to achieve voluntary compliance. (45 C. F. R. § 80.6.)

If discrimination is found, and if voluntary compliance is not forthcoming, the regulations provide for a hearing to determine whether or not federal assistance should be terminated (45 C. F. R. §§ 80.8-80.11). Intra-agency and judicial review procedures are provided once termination is found appropriate. *Id.* And finally, the regulations afford a procedure through which federal assistance which has been terminated may be reinstated. (45 C. F. R. § 80.10(g).)

4. 117 Cong. Rec. 30407 (1971). See Opinion of Court of Appeals, Cert. Pet. A. 15; A. 29-31.

Title IX was itself modeled after Title VI of the Civil Rights Act of 1964, 42 U. S. C. Sec. 2000d *et. seq.* The legislative history of Title VI is fully discussed in the Supplemental Brief for Petitioner, *The Regents of the University of California v. Bakke*, No. 76-811, at pages 13-27.

3. Prior Decisions of This Court.

Contrary to petitioner's strained reading of *Cort v. Ash*, 422 U. S. 66 (1974), to the effect that "no purpose to deny a cause of action is evident in either Title VI or Title IX" (Cert. Pet. 11), the Court's decisions point the other way. The provision of a specific means of enforcement in Title IX implies that no other remedy was intended. *National Railroad Passenger Corp. [Amtrak] v. National Association of Railroad Passengers*, 414 U. S. 453, 458 (1974):

A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

To the same effect is *Securities Investor Protection Corp. v. Barbour*, 421 U. S. 412 (1975); and, despite petitioner's interpretation, *Cort v. Ash*, 422 U. S. 66, 82-84 (1975), where the Court denied a private right of action, in part, on the absence of any evidence that Congress intended a private right of action.

A closely analogous case is *Brown v. General Services Administration*, 425 U. S. 820 (1976), holding that § 717 of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-16 (which, like Title IX, provides for administrative and judicial remedies) was the exclusive remedy for claims of discrimination in federal employment. This Court's explanation for its decision is strikingly applicable here (425 U. S. at 832-33):

The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not

contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. . . . It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

The doctrine of primary jurisdiction also dictates that the judiciary stay its hand until the administrative agency, charged by Congress with effectuation and enforcement of the statutory prohibition, has acted.

HEW has stated that the issues raised in petitioner's administrative complaint against Illinois medical schools are "national in scope," and that "national Office for Civil Rights [of HEW] policy must be developed." Cert. Pet. A. 35. Within a few months of filing her administrative complaints, petitioner initiated this suit, asking that respondents be enjoined from engaging in the allegedly improper conduct which is the subject of her administrative complaints and that the respondent schools be required to admit her.⁵

This Court has underscored the applicability of the primary jurisdiction doctrine in similar circumstances involving the development of national transportation policy by the ICC. In *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade*, 412 U. S. 800, 821 (1973), the Court said:

Ordinarily, then, a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expresses its view. But when a

5. Petitioner complains of HEW's delay in acting on her administrative complaint. Cert. Pet. 14. One possible explanation is that, with its dramatic change of position after the filing of the petition for rehearing in the Court of Appeals, HEW is delaying development of "national policy" pending final disposition of this action. In any event, the remedy for HEW's procrastination is not the implication of a private right of action against the respondent medical schools, but an order directing HEW to proceed with its Congressional mandate. In fact, the amended complaint in this case asks for just such a remedy against HEW as an alternative to an injunction against the University respondents.

court issues an injunction pending final determination, one important element of its judgment is its estimate of the probability of ultimate success on the merits by the party challenging the agency action. Depending on the type of error the reviewing court finds in the administrative proceedings, *the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. This is precisely what the doctrine of primary jurisdiction is designed to avoid.* The fact that issuing an injunction may undercut the policies served by the doctrine of primary jurisdiction is therefore an important element to be considered when a federal court contemplates such action. [Citations omitted.] (Emphasis added.)⁶

4. *Lau v. Nichols*.

Petitioner has relied throughout this litigation on *Lau v. Nichols*, 414 U. S. 563 (1974), a class action to compel bilingual instruction against the San Francisco school district on behalf of the 1800 Chinese-speaking students in the district. Petitioner quotes from the Court's decision to the effect that it did not rely on the Equal Protection Clause but solely on Title VI in reversing the lower court. Cert. Pet. 10. From this petitioner assumes that the Court based *jurisdiction* on Title VI, the prototype of Title IX. But jurisdiction in fact was based on 42 U. S. C. § 1983, the defendant being a state agency.⁷ Jurisdiction under § 1983 is invoked through a claim of "deprivation of rights . . . secured by the Constitution and laws." The Court's comment was simply an indication that it relied on the law, not the Constitution, to find the deprivation of rights. It did not say that it found jurisdiction under Title VI rather than § 1983, as petitioner assumes. The interplay between § 1983 and federal

6. See Cert. Pet. A. 16 n. 17.

7. The complaint here alleged that the University respondents, although private institutions, were within the purview of 42 U. S. C. § 1983. The Court of Appeals found otherwise. Cert. Pet. A. 4-11. This finding is not challenged in the Petition.

law is discussed in the Court of Appeals opinion. Cert. Pet. A. 31 n. 6. The parties in *Lau* never briefed or argued, nor did the Court consider, whether Title VI alone, apart from state action under § 1983, would support a private right of action.⁸

5. The Civil Rights Attorney's Fees Award Act of 1976.

Petitioner argues that the Civil Rights Attorney's Fees Award Act of 1976, 42 U. S. C. A. § 1988, adopted during the pendency of this litigation, is Congressional recognition of an intent to create a private right of action under Title IX since Title IX is mentioned in the Act. Cert. Pet. 8-9.

The Court of Appeals gave the complete answer to this argument. Cert. Pet. A. 25-27. Final debate on the bill took place after publication of the initial Court of Appeals decision in this case. This very case—by name—was referred to during the closing debate by Representative Railsback, one of the sponsors. He did not state the case was inconsistent with Congressional intent. To the contrary, he observed that it had to come to his attention that by adopting the Attorney Fee's bill "Congress might implicitly authorize a private right of action under Title VI and Title IX." He then stated unequivocally: "This is not the intent of Congress. . . . The bill does not authorize or statutorily grant any private right of action which does not now exist." 122 Cong. Rec. H12161 (daily ed. Oct. 1, 1976.)

8. There are other distinctions between *Lau* and the instant case. *Lau* concerned a large number of students—1800 Chinese-speaking students in San Francisco. One of the concurring opinions noted that if in another case the concern was with one or a few children, "I would not regard today's decision . . . as conclusive. . . . For me, numbers are at the heart of this case . . ." 414 U. S. at 571-72. This point was relied on in *Serna v. Portales Municipal Schools*, 499 F. 2d 1147, 1154 (10th Cir. 1974), in denying a private action under Title VI. The other concurring opinion in *Lau* expressed doubt that relief could be based on Title VI and relied on the HEW guidelines which required "affirmative steps to rectify the language deficiency." 414 U. S. at 569-71.

As the Court below observed, "We doubt that legislative history could be much clearer." Cert. Pet. A. 27.⁹

6. The Bakke Case.

Petitioner comments on the request by this Court for the filing of supplemental briefs in *Regents of the University of California v. Bakke*, No. 76-811, discussing the application of Title VI of the Civil Rights Act of 1964. Petitioner appears to suggest that this request manifests a recognition of independent jurisdiction under Title VI—and presumably under Title IX which was patterned after Title VI.

We cannot speculate on the Court's purpose in requesting supplemental briefs. The fact remains that jurisdiction in *Bakke* is clear under 42 U. S. C. § 1983 because the University of California is a state school, not a private institution as are the respondent Universities here. In this respect, *Bakke* is identical to *Lau*.

Moreover, there is a significant distinction between the *Bakke* and *Cannon* issues. *Bakke* raises a possible conflict between affirmative action efforts and alleged reverse discrimination which may result from these efforts. Its resolution is of overriding importance not only with respect to voluntary special admissions programs, but also for the guidance of state and federal agencies responsible for the enforcement of various equal employment and other civil rights statutes and for institutions upon which the statutory obligations are imposed. This issue is appropriately determined in the first instance by the judiciary.

9. Petitioner also refers to the Rehabilitation Act of 1973, 29 U. S. C. § 794. Cert. Pet. 5, 11 n. 12. That Act contains no administrative enforcement and judicial review provisions comparable to those in Title IX. See the Court of Appeals opinion on rehearing, Cert. Pet. A. 32. The suggestion that *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977), is inconsistent with the opinion below overlooks the footnote in *Lloyd* which leaves open as "premature" the question whether after procedural enforcement regulations are issued to implement the Rehabilitation Act "the judicial remedy available must be limited to post-administrative remedy judicial review." *Id.* at 1286 n. 29.

Cannon is of a different order. This is an individual claim that admission to respondent medical schools was denied because of the applicant's sex. A federal agency is available to consider such a claim and its processes have been invoked. A procedure for enforcement is provided. If there are intimations of broader issues in the claim, then, in the first instance at least, HEW ought to consider the implications as it is now apparently prepared to do. See HEW letter to Mr. Cannon, Cert. Pet. A. 35. HEW has been supplied with full medical school applicant data by both respondent Universities. HEW has "completed the on-site investigations" into Ms. Cannon's allegations. *Id.* If the agency is dragging its feet, then the alternate relief asked for in the complaint—a mandatory injunction against HEW—may be in order. But "from a policy viewpoint we see little to be gained by involving the judiciary in every individual act of discrimination based on sex." Court of Appeals, Cert. Pet. A. 16.

CONCLUSION.

For the foregoing reasons, we respectfully request that the petition for a writ of certiorari be denied.

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January, 1978

APPENDIX

TITLE IX, EDUCATION AMENDMENTS OF 1972

20 U. S. C.—

§ 1681. Sex—Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

* * * * *

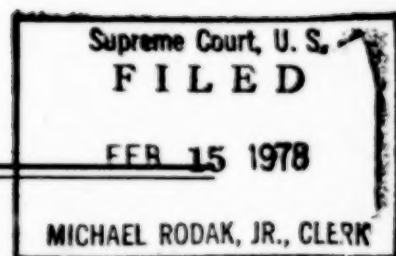
§ 1682. Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under

such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title.



IN THE
Supreme Court of the United States

October Term, 1977

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

GERALDINE G. CANNON,

Petitioner,

v.

NORTHWESTERN UNIVERSITY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**Reply Brief of Petitioner
to Non-Federal Respondents**

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Reply Brief of Petitioner To Non-Federal Respondents

This reply is directed to the Joint Brief in Opposition filed on behalf of all respondents other than the federal respondents.

The federal respondents have informed petitioner that they propose to support petitioner in this Court as they did on rehearing in the Seventh Circuit. Accordingly, no reply to the federal respondents may be necessary.

QUESTION PRESENTED

Limitation of the question presented reflects the inconsistent rulings of the court below.

The university respondents first rephrased the question presented in the Petition to exclude denial of the alternative relief sought against the federal respondents, namely, the administrative enforcement which the court below held to be the exclusive remedy for violation of section 901 of Title IX, 20 U.S.C. § 1681. (Pet.Cert. p. 4). The schools' brief twice recognized that their opposition argument is dependent upon the validity of petitioner's alternate claim against the federal respondents. (Jt.Br.Op. pp. 8 n. 5, 12).

REPLY ARGUMENT

1. The "Introduction" distorts petitioner's qualifications and the record.

While, on the one hand, the schools say that the "issue here is not whether petitioner was academically qualified", (Jt.Br.Op. p. 4), their brief first points to certain of petitioner's academic qualifications, and suggests she was not admitted—or would not be admitted—to medical school on those grounds. The facts of record are contrary.¹

First, the schools say that 2,000 applicants at The University of Chicago had better "academic qualifications." In fact, the published median college grade point average

¹ The factual record consists of the published data referred to in the verified complaints and an affidavit submitted in support of a motion for summary judgement by The University of Chicago which was not granted. No fact on which petitioner's claim was based is "directly contradicted" by that affidavit as implied by the schools' brief. (Jt. Br. Op. p.4).

("GPA") of the 1973 entering class at Chicago was 3.55.² Hers was 3.63.

Second, Chicago acknowledges that 12% of its entering class had average total Medical College Admission Test ("MCAT") scores below 575.³ Hers was 585.

Third, Chicago's Dean of Students conceded that his use of the term "academic qualifications" included the school's published statement that applicants "over 30 without advanced degrees . . . are not encouraged to apply."

Fourth, they point to Chicago's exculpatory data that 18.1% of the applicants and 18.3% of the entering classes were women. These would be meaningful numbers only in the circumstance—unlikely but certainly unproven—that the spectra of male and female qualifications were almost identical.⁴

Fifth, the schools say that petitioner's MCAT mathematical subtest score was in the lower 20% of the applicant group. Apart from being factually wrong (she was in the 69th MCAT percentile on math) not one word either in the record or elsewhere suggests that respondents have ever, before this lawsuit, considered math scores as having

² "Medical School Admission Requirements 1975-76" Association of American Medical Colleges.

³ *Id.*

⁴ To illustrate the fallacy of such numbers: if in fact the males were significantly 'better qualified' than the females, the 18.1—18.3 numbers would prove the existence of a quota; or if the females were significantly 'better qualified' than the males, the numbers would prove discrimination. The aggregate percentages for 1972-75 also conceal a decline in the acceptance percentage that was 3½ times as great for women as for men. Moreover, published admission policies which have a disproportionately adverse effect on women also must have a chilling effect on the number of women applicants.

any particularly significant bearing on medical school admissions.⁵

The thrust of petitioner's complaint was not only that she was denied a *fair* chance at admission—she was denied *any* chance. Chicago and Northwestern University have published their selection procedures. Chicago's is of record. All applicants are preliminarily screened on the basis of their intellectual qualifications. "The student's scholastic record, along with his Medical College Admission Test scores, are used in this procedure." The survivors (10% at Chicago, 15% at Northwestern) are then interviewed.⁶ Petitioner's GPA and MCAT placed her comfortably within the group to be interviewed under this procedure. She was not.

The averments of the complaint and the stubborn facts are that petitioner was screened out at the initial level on the basis of her age. Her combined GPA and MCAT science score would have given her an approximately 70% chance of admission to medical school on these two criteria alone.⁷ And as the Petition has demonstrated, "age" is, in practical effect, a euphemism for gender. (Pet.Cert. pp. 6-8).

The schools argue that petitioner should be denied any opportunity to prove her claims because they may be contested and because her success on the jurisdictional issue may burden the courts with many other Title IX suits, some perhaps frivolous. (Jt.Br.Op. pp. 4-5). Merely to suggest such a result, as did the court below, is to confirm the conflict with *Conley v. Gibson*, 355 U.S. 41 (1957). Neither difficult nor frivolous litigation is peculiar to Title IX.

The schools also claim, as did the court below, that Title IX should not be enforced as Title VI was enforced in *Lau v. Nichols*, 414 U.S. 563 (1974). (Jt.Br.Op. p. 5). The primary

⁵ The math score is of course included in the average total MCAT score.

⁶ *Op. Cit. supra* note 2.

⁷ See the attached Table of Applicant—Acceptance Statistics. (App. p. A-1). Petitioner's MCAT science score was 585.

basis offered to reconcile such refusal to "stretch a statute by judicial interpretation" with the decision of this Court in *Lau* is an unprecedented jurisdictional preference for actions by "large groups".⁸ The alternative basis, express authorization in 42 U.S.C. § 1983, is flatly inconsistent with their view of the statutory scheme under the four factor analysis of *Cort v. Ash*, 422 U.S. 66 (1974).

2. Argument under "The Statutory Scheme" and "Prior Decisions of this Court" overlooks Section 1983.

The schools claim that by providing administrative enforcement in the statutory scheme, Congress evidenced an intention to exclude judicial enforcement except by way of judicial review. Not a single congressman said so in the hearings, reports and debates on Title IX or Title VI. In fact, Congress declared that Title VI and Title IX "permit a judicial remedy through a private action." (Pet.Cert. pp. 8-9)

Mere provision for some administrative procedure to implement congressional policy generally has not been held to evidence an intention to preclude a judicial remedy. Indeed, administrative enforcement also is available in the situations where a judicial remedy has been most frequently implied. Note, "Implying Civil Remedies from Federal Regulatory Statutes," 77 *Harv. L. Rev.* 285 (1963). This Court required and relied upon considerably greater and uncontradicted evidence of congressional intent to reject private actions in *National Railroad Passenger Corp. [Amtrak] v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) and *Cort*.

Most importantly, the schools' argument does not even attempt to account for the express authorization in 42 U.S.C.

⁸ See (Jt.Br.Op. pp. 5, 10 n. 8) 559 F.2d 1074 (Pet.Cert. App. pp. A-16 n. 16, A-17).

§ 1983 of a private right of action by an individual under Title VI and Title IX in the case of state action programs receiving federal financial assistance. The schools themselves elsewhere present exactly that argument in attempting to distinguish *Lau* and possibly *Regents of the University of California v. Bakke*, No. 76-811, should this Court decide it also under Title VI and the HEW regulations instead of the Constitution. (Jt.Br.Op. pp. 9, 11).

If a private right of action would conflict with the statutory scheme in the case of private programs receiving federal financial assistance, precisely the same considerations apply in the case of state programs. Congress applied the same policy and the same administrative procedures to all programs receiving federal financial assistance, state and private.⁹

By utilizing the state action distinction for *Lau*, the schools do not even purport to argue for an implicit exception of Title VI under section 1983, even to the extent that the statute and the regulations thereunder may go beyond the Constitution.¹⁰ But without such an exception they cannot sustain their argument based upon the statutory scheme.

3. Commentary on "The Civil Rights Attorney's Fees Awards Act of 1976" avoids petitioner's argument.

The schools argue that the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988, established that the Act did not create any new

⁹ The schools' brief states that the finding they are not within the purview of section 1983 is not challenged in the Petition. (Jt.Br.Op. p. 9 n. 7). Such finding is challenged under *Conley* to the extent that the state action distinction is valid. (Pet.Cert. pp. 13-14). Petitioner contends it is not.

¹⁰ See, *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan District Housing Authority*, 429 U.S. 252 (1977) as well as *Lau* itself.

private right of action. Petitioner agrees. She never has claimed otherwise. Petitioner claimed that the specific inclusion of Title VI and Title IX in the Act confirmed the earlier congressional declaration that such laws already "permit a judicial remedy through a private action." (Pet.Cert. p. 8).

The bipartisan leadership reports had reflected both the express understanding that a private action already was permitted under Title VI and Title IX and the express disclaimer of intent to create any new right of action.¹¹ Both thoughts are fully compatible and simply do not conflict as the schools insist. To argue the contrary is to assert that the reports of the leadership were openly and expressly inconsistent. Logic certainly does not require any inconsistency as the schools suggest.

Senator Kennedy's report specifically declared that amendment of the bill to include Title IX would avoid cost limitation of private enforcement by reason of the state action circumstances involved in *Lau*.¹² Section 1983 already had been included in the original version of the bill. Subsequent addition of Title VI and Title IX would have been meaningless if Congress believed that private enforcement thereof either was not permitted or was limited to state action programs as the schools suggest.¹³ As stated in *Brown v. General Services Administration*, 425 U.S. 820 (1976),

"The relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."

¹¹ 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16251 report of Sen. H. Scott, S.16252 report of Sen. Kennedy, and (daily ed. Oct. 1, 1976) H.12150 *et. seq.* introduction by Reps. Anderson and Drinan and H.12159-60 report of Rep. Drinan.

¹² 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16252.

¹³ Title IX was added through extraordinary procedures involving cloture of Senate filibuster in the closing days of an election year Congress.

Mere awareness that the original decision in this case had raised a question as to the existence of private actions under Title VI and Title IX does not indicate that Congress agreed with the court below.¹⁴ In fact, enactment of the law notwithstanding an awareness of such decision, indicates exactly the opposite. The terms of the Act itself, as well as the leadership reports and the remarks of virtually every congressman who spoke on the bill, confirm the congressional understanding that a private action already was permitted under both laws. (Pet.Cert. p. 8 n. 4).

4. The state action distinction of "Lau v. Nichols" and "The Bakke Case" conflicts with the analysis of the statutory scheme.

Much of petitioner's reply appropriate to the schools' argument distinguishing *Lau* and *Bakke* as state action cases already has been made above in replying to their opposite argument based on the statutory scheme.

The schools brief claims that jurisdiction in *Lau* was based on 42 U.S.C. § 1983. However, section 1983 is not a jurisdictional statute. *Blue v. Craig*, 505 F.2d 830 (4th Cir. 1974). The related jurisdictional statute is 28 U.S.C. § 1343(3). Jurisdiction is conferred on the federal courts just as clearly by 28 U.S.C. § 1343(4) in non-state action civil rights cases under Title VI or Title IX.

The schools' argument that this Court enforced Title VI and the HEW regulations in *Lau* on the basis of some form

¹⁴ The Senate apparently was unaware of the decision rendered only 25 days before it acted. Even in the House, Rep. Rainsback, in referring to this case by name, indicated no awareness that the basis for the decision had been the asserted inconsistency of private actions with congressional intent. He conceded only that he was informed "there exists a serious question". 122 Cong. Rec. (daily ed. Oct. 1, 1976) H.12161. His remark would be a gross understatement by anyone familiar with the decision below.

of jurisdiction pendant to that established under section 1983 conflicts with their view of "The Statutory Scheme". There they assert Congress evidenced its intention that administrative action followed by judicial review should be the exclusive remedy.

If the schools' distinction of the decisions of this Court in *Lau* and possibly *Bakke* as state action cases under section 1983 is correct, a private action cannot be in conflict with the statutory scheme of Title VI or Title IX. The prior decisions of this Court then require the implication of a private right of action under the four factor analysis articulated in *Cort*.

Petitioner recognizes the anticipated significance of the *Bakke* decision noted by the schools. (Jt.Br.Op. p. 11). However, they themselves assert that this case presents the question of enforcement under Title VI and Title IX for non-state schools and programs which *Bakke* does not. Their suggestion of limited significance for this case (Jt.Br.Op. p. 12) conflicts directly with their concern over the broad jurisdictional issue presented. (Jt.Br.Op. p. 2).

5. Doctrines of primary jurisdiction and exhaustion do not apply to a remedy which is not available.

The record establishes beyond dispute that federal administrative enforcement, if exclusive, has been unreasonably delayed or withheld in violation of 5 U.S.C. § 706. Delay of over 2½ years without so much as preliminary findings is acknowledged by all parties. Such delay of an exclusive remedy for violation of national policy is unreasonable even without reference to *Conley*.

Accordingly, the decisions of this Court in *Allen v. Board of Education*, 393 U.S. 544 (1969) and *Rosado v. Wyman*, 397 U.S. 397 (1970) as well as the related decision of the Seventh Circuit in *Lloyd v. RTA*, 548 F.2d 1277 (7th Cir.

1977), require the judicial remedy sought by petitioner and supported by the federal respondents.¹⁵ The doctrines of primary jurisdiction and exhaustion relied upon by the university respondents (Jr.Br.Op. pp. 7-9, 12) do not apply where meaningful administrative action may, but need not, be provided by the relevant agency or official. *Levers v. Anderson*, 326 U.S. 219 (1945). Delay of equitable relief until application has been made for the potential administrative relief is the limit of those doctrines in such circumstances. *U.S. v. Abilene & So. Ry. Co.*, 265 U.S. 274 (1924). *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973) is not to the contrary.

CONCLUSION

The importance and substantiality of the question presented in the Petition has not been denied by the university respondents. The only claim is that a judicial remedy may be premature. But review here cannot be premature where the alleged necessity of following further administrative proceedings plainly conflicts with the denial of such proceedings for almost three years. Such circumstance, in and of itself, raises a significant issue justifying the grant of certiorari.

In light of the schools' agreement with petitioner that she should have a judicial remedy for unreasonable delay against HEW and the agreement of HEW with petitioner that she should have a judicial remedy against the schools, the need for review of the action below is indisputable. Indeed, petitioner suggests that summary reversal is now in order. No party has urged that petitioner should continue without any remedy at this late date.

¹⁵ The schools' asserted distinction of *Lloyd* (Jt.Br.Op. p. 11 n. 9) overlooks that the time delay here involved is even greater and under an identical regulatory situation. (Pet. Cert. p. 12 n.7).

For the foregoing reasons, a writ of certiorari should issue to review the judgement and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

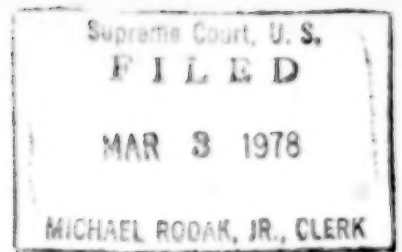
Table of Applicant—Acceptance Statistics

Overall GPA (and Letter Grades)	MCAT Science Subtest Scores					
	Lower Scores			Higher Scores		
	200s	300s	400s	500s	600s	700s
Higher Grades	Quadrant II			Quadrant I		
3.8 - 4.0 (A)	$\frac{0}{1}$	$\frac{4}{15}$	$\frac{55}{101}$	$\frac{442}{566}$	$\frac{933}{1,047}$	$\frac{278}{282}$
3.4 - 3.7 (A- & B+)	$\frac{1}{5}$	$\frac{32}{110}$	$\frac{317}{781}$	$\frac{1,964}{3,162}$	$\frac{2,429}{3,167}$	$\frac{432}{496}$
3.0 - 3.3 (B)	$\frac{1}{17}$	$\frac{57}{338}$	$\frac{338}{1,931}$	$\frac{1,550}{4,948}$	$\frac{1,802}{3,332}$	$\frac{196}{307}$
Lower Grades	Quadrant III			Quadrant IV		
2.6 - 2.9 (B- & C+)	$\frac{3}{36}$	$\frac{58}{640}$	$\frac{227}{1,965}$	$\frac{546}{3,294}$	$\frac{346}{1,511}$	$\frac{53}{131}$
2.0 - 2.5 (C)	$\frac{2}{80}$	$\frac{80}{716}$	$\frac{196}{1,449}$	$\frac{196}{1,389}$	$\frac{88}{576}$	$\frac{9}{30}$
0.0 - 1.9 (below C)	$\frac{1}{16}$	$\frac{10}{112}$	$\frac{11}{115}$	$\frac{6}{54}$	$\frac{4}{18}$	$\frac{0}{0}$

Figure 1

Distribution of applicants and acceptees by undergraduate college grade-point average (GPA) and by scores on the Science subtest of the Medical College Admission Test (MCAT) for the 1973-74 entering class. Numerator in each cell is number of acceptees with indicated grades and MCAT scores; denominator is number of applicants with these characteristics.

Source: Association of American Medical Colleges.
Petitioner's overall GPA was 3.63 and her MCAT science subtest score was 585.



No. 77-926

In the Supreme Court of the United States

OCTOBER TERM, 1977

GERALDINE G. CANNON, PETITIONER

v.

THE UNIVERSITY OF CHICAGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A-2 to A-21) is reported at 559 F. 2d 1063. The opinion on rehearing (Pet. App. A-22 to A-34) is reported at 559 F. 2d 1077. The memorandum of decision of the district court is reported at 406 F. Supp. 1257.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1976. The court's opinion on rehearing was issued on August 9, 1977. A timely petition for

rehearing was denied on October 3, 1977. The petition for a writ of certiorari was filed on December 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a private person may sue to enforce the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. (Supp. V) 1681 *et seq.*

STATEMENT

Petitioner initially brought these actions for declaratory, injunctive, and monetary relief against respondents, the University of Chicago, Northwestern University, and various individual officers of those institutions. She later joined as defendants the Secretary of Health, Education, and Welfare ("the Secretary") and the Regional Director of HEW's Office for Civil Rights. Petitioner alleged that she had been discriminatorily denied admission to medical school on the basis of her sex, in violation of Title IX of the Education Amendments of 1972, 86 Stat. 373, 20 U.S.C. (Supp. V) 1681 *et seq.*¹ With exceptions not relevant here, Title IX prohibits discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance." Petitioner sought injunctions directing respondent universities to reevaluate her medical school applications and to admit her

¹ Petitioner also alleged violations of several other federal statutes (see Pet. App. A-4). She does not now challenge the lower court's disposition of these aspects of her complaints (see Pet. 3).

to medical school. She also sought declaratory relief and damages. Alternatively, she asked the district court to compel the Secretary to act favorably in response to her administrative complaints.

The district court dismissed petitioner's suits for failure to state a claim upon which relief could be granted (406 F. Supp. 1257).² The court held, *inter alia*, that Title IX does not authorize a private right of action against recipients of federal financial assistance, and that the Secretary's delay in acting on petitioner's administrative complaints did not justify bypassing the administrative procedure established in Title IX (see 20 U.S.C. (Supp. V) 1682).

The court of appeals affirmed (Pet. App. A-1 to A-21). The panel ruled that Title IX does not provide a private right of action for individual victims of sexual discrimination practiced by educational institutions receiving federal financial assistance. Rather, said the court, the only remedies available to such persons are those specifically enumerated in the statute, namely, administrative efforts to secure voluntary compliance with Title IX from allegedly offending institutions, followed by agency termination of funding if conciliatory efforts fail (Pet. App. A-10 to A-16).

After the court of appeals issued its original opinion, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641

² The reported opinion deals only with the complaint against the University of Chicago and its officers. The complaint against Northwestern University was subsequently dismissed in reliance on the earlier opinion.

(to be codified at 42 U.S.C. 1988). In pertinent part, that statute authorizes the award of attorney's fees to the prevailing party in actions brought to enforce the provisions of Title IX. Principally in order to give the parties an opportunity to discuss the possible implications of the Attorney's Fees Awards Act, the court of appeals granted rehearing limited to the question "whether a private right of action lies under Title IX" (Pet. App. A-23). On rehearing, the federal respondents supported petitioner.³ Nevertheless, the panel adhered to its previous holding that "implication of a private judicial remedy would be inconsistent with the legislative intent and underlying purposes of the statutory scheme" (Pet. App. A-29).

DISCUSSION

The court of appeals correctly held that petitioner's complaints did not state a claim upon which relief could be granted against the federal respondents. The petition does not address this aspect of the judgment below, and review by this Court is not warranted. The court of appeals erroneously ruled that Title IX does not authorize a private right of action against the non-federal respondents. If permitted to stand, this decision will pose a serious obstacle to the effective

³ As reflected in a September 1974 letter from the Assistant General Counsel of HEW (Pet. App. A-36 to A-38), the Secretary's views on rehearing corresponded with the long-standing HEW position regarding Title IX. The failure of the federal respondents to endorse this position earlier in this litigation is attributable to communication lapses between national and regional HEW offices, not to any eleventh hour policy shift.

enforcement of Title IX. Petitioner seeks review of this facet of the judgment below, and the important issue is squarely raised. Accordingly, the federal respondents urge this Court to grant review limited to the question presented in the petition.

1. The courts below properly determined that petitioner's complaints failed to state a claim against the federal respondents. Even if it were conceded that federal courts might, in appropriate circumstances, entertain Title IX suits brought against federal officials by actual or intended beneficiaries of federally assisted programs, cf. *Adams v. Richardson*, 480 F. 2d 1159 (C.A. D.C.); *Gautreaux v. Romney*, 448 F. 2d 731 (C.A. 7); *Shannon v. Housing and Urban Development*, 436 F. 2d 809 (C.A. 3) (all involving complaints under Title VI of the Civil Rights Act of 1964), it would not follow that *any* such action could survive a motion to dismiss. A Title IX suit against federal defendants can be maintained, if at all, only where a plaintiff alleges general abdication of statutory responsibilities, e.g., *Adams v. Richardson*, *supra*, 480 F. 2d at 1162, or conscious collaboration in allegedly discriminatory conduct by a recipient of federal funds, e.g., *Gautreaux v. Romney*, *supra*, 448 F. 2d at 737-739, or agency violation of an explicit statutory prohibition, e.g., *Leedom v. Kyne*, 358 U.S. 184.⁴ Petitioner has not advanced and does not now advance

⁴ As the district court noted, delay in administrative action does not justify federal court intervention under Title IX (406 F Supp. at 1260). See also Pet. App. A-17 and n. 19.

any such allegation. Particularly in light of the petitioner's failure to challenge the disposition below as it affects the federal respondents, this portion of the court of appeals' decision does not merit review.

2. By contrast, the existence *vel non* of a private right of action under Title IX to sue recipients of federal financial assistance is an important issue that this Court should resolve.⁵ On several occasions this Court has found it necessary to decide whether particular statutes, though silent on the subject of private remedies, should nevertheless be construed to authorize enforcement through private suits. See, *e.g.*, *Cort v. Ash*, 422 U.S. 66; *Rosado v. Wyman* 397 U.S. 397; *Allen v. State Board of Elections*, 393 U.S. 544. The comparable question presented here is no less deserving of the Court's attention. Title IX is a noteworthy piece of legislation designed to eliminate gender discrimination in federally funded education programs. The availability of a private right of action under Title IX would contribute substantially to effective implementation of the statute's goals. Although the Seventh Circuit is thus far the only court of appeals to rule on the issue, a number of district courts have reached conflicting conclusions on whether private suits may be maintained under Title IX.⁶ The ques-

⁵ Of course, in answering the question presented by petitioner, this Court need not reach the merits of her claim, a subject on which the federal respondents express no opinion.

⁶ Compare, *e.g.*, *Piascik v. Cleveland Museum of Art*, 426 F. Supp. 779 (N.D. Ohio) (private right of action does exist),

tion is sufficiently significant to the administration of an important federal statute to merit resolution by this Court even in the absence of a disagreement among the courts of appeals.

In addition, the decision of the court of appeals challenged by petitioner represents an unjustified departure from the approach adopted by this Court in *Cort v. Ash*, *supra*, and *Allen v. State Board of Elections*, *supra*. In those cases, the Court considered whether private actions could be maintained under a criminal statute prohibiting corporate campaign contributions in Presidential elections, 18 U.S.C. 610, or under Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. 1973c, despite the fact that those statutes did not explicitly authorize such suits. In *Cort*, the Court listed four factors relevant in "determining whether a private remedy is implicit in a statute not expressly providing one" (422 U.S. at 78):

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," * * * — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the under-

with *Cape v. Tennessee Secondary School Athletic Association*, 424 F. Supp. 732 (E.D. Tenn.), reversed on other grounds, 563 F. 2d 793 (C.A. 6); and *Lodwig v. Board of Education of Pleasant Local School District*, Civ. No. C-76-604 (N.D. Ohio, March 31, 1977), appeal pending, No. 77-3375 (C.A. 6) (private right of action does not exist).

lying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

With respect to the first question posed in *Cort*, the decision in *Allen* is dispositive. Petitioner is plainly one of the class for whose special benefit Title IX was enacted. Section 901 of Title IX, 86 Stat. 373, 20 U.S.C. (Supp. V) 1681, creates a right in favor of all potential beneficiaries of federally assisted education programs. It provides:

No person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

Similarly, Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, at issue in *Allen*, provides that "no person shall be denied the right to vote for failure to comply" with a state voting qualification requirement covered by, but not approved under, Section 5. The *Allen* Court held that the particular phrasing chosen by Congress evidenced a legislative intention to identify and protect a particular class of citizens and to confer on that class a legally enforceable right. In the Court's words (393 U.S. at 557), "[t]he guarantee of § 5 * * * might well prove an empty promise unless the private citizen were allowed to seek judicial en-

forcement of the prohibition." Likewise here, where Congress has used the same "no person" construction, the legislature has displayed an intention to protect a particular class of individuals, prospective participants in federally funded education programs, and petitioner is indisputably a member of that class.

The court of appeals, however, decided that application of the second and third criteria outlined in *Cort*⁷ compelled the conclusion that no private right of action exists under Title IX. A different result, said the court (Pet. App. A-29), "would be inconsistent with the legislative intent and underlying purposes of the statutory scheme." This assertion is incorrect. None of the contemporaneous legislative history of Title IX concerns the viability of private actions under that statute.⁸ Nevertheless, several elements coalesce to demonstrate that such actions are consistent with congressional intent and do promote the underlying purpose of Title IX.

⁷ The fourth test suggested in *Cort*, whether a particular cause of action or subject area has been traditionally relegated to state law, presents no obstacle to implication of a private right of action here.

⁸ In *Cort v. Ash, supra*, 422 U.S. at 82, this Court said that,

in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling.

No such denial, explicit or otherwise, is contained in the legislative history.

First, Title IX was avowedly based upon Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. 2000d,⁹ and by the time Title IX was enacted in 1972, several courts had already interpreted Title VI to provide a private right of action against recipients of federal financial assistance. See, e.g., *Bossier Parish School Board v. Lemon*, 370 F. 2d 847 (C.A. 5), certiorari denied, 388 U.S. 911; *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill.). Other courts had impliedly recognized such a right by sustaining on the merits private parties' claims based upon Title VI. See, e.g., *Gautreaux v. Romney*, *supra*; *Shannon v. Housing and Urban Development*, *supra*.¹⁰ Where the courts had thus indicated their willingness to entertain private causes of action under Title VI,¹¹ it is reasonable to infer that Congress intended a similar remedy to be avail-

⁹ See, e.g., 118 Cong. Rec. 5807 (1972) (remarks of the bill's sponsor, Senator Bayh).

¹⁰ Other courts, including this Court, have impliedly recognized a private cause of action under Title VI subsequent to the enactment of Title IX. See, e.g., *Lau v. Nichols*, 414 U.S. 563; *Serna v. Portales Municipal Schools*, 499 F. 2d 1147 (C.A. 10); *Garrett v. City of Hamtramck*, 503 F. 2d 1236 (C.A. 6); *Adams v. Richardson*, *supra*; *NAACP, Western Region v. Brennan*, 360 F. Supp. 1006 (D.D.C.); *Anderson v. San Francisco Unified School District*, 357 F. Supp. 248 (N.D. Cal.).

¹¹ The government's contention that there is a private right of action under Title VI is discussed in detail in the Supplemental Brief for the United States as Amicus Curiae in *Regents of the University of California v. Bakke*, No. 76-811, pp. 24-32. Copies of that brief are being furnished to the parties in this case.

able under Title IX, a statute deliberately modeled after Title VI.¹²

The court below ruled (Pet. App. A-12, A-31 and n. 6), however, that no individual private right of action exists under either Title VI or Title IX. In rejecting the availability of private suits under Title VI, the court of appeals misread this Court's decision in *Lau v. Nichols*, 414 U.S. 563. In *Lau*, the Court decided a private Title VI claim on its merits. The court below discounted *Lau's* implicit holding that a private suit may be maintained under Title VI, because *Lau* "involved an attempt by a large number of plaintiffs to enforce a national constitutional right" (Pet. App. A-12). In the view of the court of appeals, *Lau* "does not indicate that Title VI provides a pri-

¹² In dealing with a different statute, Congress has assumed without question that both Title VI and Title IX authorize private actions. Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. (Supp. V) 794, provides that no handicapped person "shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This provision "was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964 * * * and section 901 of the Education Amendments of 1972 * * *." S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974). The Senate Labor and Public Welfare Committee noted (*id.* at 40) that "section 504, which closely follows the models of the above-cited anti-discrimination provisions, would * * * permit a judicial remedy through a private action." Apparently in recognition of these comments, this Court has instructed a lower federal court to reach the merits of a private suit brought under Section 504. *Campbell v. Kruse*, No. 76-1704, decided October 3, 1977.

vate right of action for each individual discriminatee" (*ibid.*). In support of its conclusion, the court cited Mr. Justice Blackmun's concurring opinion in *Lau*. The relevant portion of that opinion states (414 U.S. at 571-572):

* * * I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom. * * *

* * * [If] we * * * [were] concerned with * * * just a single child * * * I would not regard today's decision * * * as conclusive * * *.

These remarks suggest only that the relief granted in the case of a given school district, *e.g.*, mandatory initiation or continuation of bilingual instruction, may well vary depending upon the number of non-English speaking children in that district, not that Title VI created a private right of action only for large groups of children.¹³

On rehearing, the court of appeals reaffirmed its reading of *Lau* (Pet. App. A-33), and added that, in any event, the decision provides no support for peti-

¹³ Three Justices, concurring in the result in *Lau*, noted that the respondents in that case did not contest the standing of the complainants "to sue as beneficiaries of the federal funding contract" there involved. 414 U.S. at 571 n. 2 (Stewart, J., concurring). The opinion of the Court, however, explicitly upheld the complainants' statutory claim (414 U.S. at 566) without discussing any question of standing.

tioners, because *Lau* was brought under the authority of 42 U.S.C. 1983 (Pet. App. A-34). The court adopted a similar assessment of other cases involving private suits under Title VI (Pet. App. A-31 n. 6). But this analysis is incomplete. Although the court correctly asserted that Section 1983 may provide a vehicle for the enforcement of federal statutes (see, *e.g.*, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n. 7), that use of Section 1983 is rare, especially in contrast to the statute's frequent invocation in the enforcement of constitutional provisions. More important, the pre-1972 cases that formed the background for the congressional determination to model Title IX after Title VI do not even mention Section 1983. See, *e.g.*, *Bossier Parish School Board v. Lemon*, *supra*, 370 F. 2d at 852 ("The Negro school children, as beneficiaries of the Act [*i.e.*, Title VI], have standing to assert their section 601 rights").¹⁴

Secondly, in 1976 Congress enacted the Civil Rights Attorney's Fees Awards Act, Pub. L. 94-559, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988), which authorizes courts to grant attorney's fees to the prevailing party in any action brought to enforce, among other civil rights statutes, Title IX and Title VI.

¹⁴ Moreover, in a number of cases, courts have granted relief under Title VI where an action under Section 1983 would not lie. For example, a Section 1983 suit could not have been maintained against the Secretary of Health, Education, and Welfare in *Adams v. Richardson*, *supra*, because Section 1983 does not provide a right of action against federal defendants, at least in the absence of evidence that the federal defendants acted under color of state law.

Supporters of the bill assumed that a private right of action existed under Title IX. See, *e.g.*, 122 Cong. Rec. S16251 (daily ed., September 21, 1976) (remarks of Senator Scott); *id.* at H12164 (daily ed., October 1, 1976) (remarks of Representative Holtzman). While the Attorney's Fees Awards Act did not itself create a new cause of action, the statements of the Act's supporters do demonstrate that private suits would not be inconsistent with the underlying scheme of Title IX.

Finally, enforcement through private actions would effectively complement the administrative enforcement mechanism provided under the statute.¹⁵ The existence of a right to challenge Title IX violations in private suits would greatly encourage voluntary compliance with the statute's ban on sex discrimination in federally financed education programs. In *Allen v. State Board of Elections*, *supra*, this Court observed that the Attorney General's enforcement of the Voting Rights Act of 1965 might well prove less than adequate if not supplemented by private legal action. The Court stated (393 U.S. at 556-557, footnotes omitted):

The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the subdivisions

¹⁵ Section 902 of the statute, 20 U.S.C. (Supp. V) 1682, provides that federal departments authorized to grant federal financial assistance may enforce the prohibitions of Title IX through termination of such assistance, or by any other means authorized by law.

thereof. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements.

See also *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210-211. Concern about potential gaps in administrative enforcement of Title IX is equally compelling, in light of the large number of federally funded education programs and participants therein. Congress' authorization of attorney's fees recoveries in civil rights suits recognizes the utility of such suits as an enforcement device. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400; *Bradley v. School Board of the City of Richmond*, 416 U.S. 696. If the broadly remedial purpose of Title IX is to be realized, enforcement should not be relegated entirely to federal agencies whose resources are necessarily limited.

Moreover, the administrative remedy available under Section 902 is essentially prospective; a program that has discriminated in the past may continue to receive federal financial assistance if it desists from doing so in the future and takes the steps necessary to come into compliance with the statute. Although future compliance would include, in many cases, rectifying the effects of past discrimination, as a practical matter this process may not afford effective relief to individual victims of unlawful discrimination. See

the Supplemental Brief for the United States in *Bakke, supra*, note 11, at pp. 28-31.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this Court may wish to defer consideration of the petition until a decision is rendered in *Regents of the University of California v. Bakke, supra*.

Respectfully submitted.

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MARCH 1978.

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MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief for Petitioner

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Brief for Petitioner

OPINIONS BELOW

The opinion of the court of appeals is reported at 559 F.2d 1063, 45 U.S. Law Week 2149. The opinion on rehearing appears at 559 F.2d 1077, 46 U.S. Law Week 2118. Both were set out in the Appendix to the Petition for a Writ of Certiorari. (pp. A-2, A-22).

The memorandum of decision in the district court was reported at 406 F. Supp. 1257.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1976. The opinion on rehearing of the Title IX issue presented for review in this Court was filed on August 9, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 3, 1977 with Chief Judge Fairchild and Judge Swygert voting to rehear the Title IX issue *en banc*. The Petition for a Writ of Certiorari was filed on December 28, 1977 and granted on July 3, 1978. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

Section 901, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of . . . professional education, and graduate higher education, and to public institutions of undergraduate higher education . . ."

Section 21(b)(2), Title IX Regulations, 45 C.F.R. § 86.21(b)(2):

"A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable."

QUESTION PRESENTED

Whether section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which prohibits discrimination on the basis of sex in education programs receiving federal financial assistance, is enforceable in a federal civil action by an individual.

STATEMENT OF THE CASE

Petitioner applied for admission to the 1975 entering class at each respondent medical school. She is an experienced surgical nurse over 30 years of age who was then completing her baccalaureate degree *cum laude*. Her academic qualifications, including college grade point average and medical college admission test scores, were higher than a substantial portion of the students subsequently admitted by each school. (App. p.3n.1, pp. 6-7).

After denial of her applications, petitioner filed administrative complaints with the Department of Health, Education and Welfare alleging that each school discriminated against women and that her application was denied at the initial screening level under a published admission policy of each school discouraging applicants over 30 years of age. Petitioner claimed this policy had a disproportionately adverse effect upon women and did not validly predict success in medical school or practice. Administrative action proved to be unavailable in fact. (App. pp. 8-16).

In the summer of 1975, petitioner commenced these civil actions. She claimed that the composition of the student body at each school reflected discrimination against women generally and requested a declaratory judgment that the particular policy under which her application was denied by each school discriminated on the basis of sex in violation of Title IX and the HEW regulations thereunder. (App. pp. 9, 13, 16-17). Reeval-

uation of her applications without regard to said policies and other remedies also were demanded. (App. pp. 17-19). Alternatively, she sought to compel administrative action by HEW or to have HEW aligned as party plaintiff in her claim, as a third party beneficiary, to enforce contractual assurances against sex discrimination given by each school to HEW in order to obtain federal financial assistance. (App. p. 5, 15-16, 19-20).

The basis for jurisdiction in the district court was that petitioner's claims are based upon federal civil rights law and that the United States is a party. (App. p. 3-4). Although each respondent school acknowledged the "receipt of federal financial assistance and its concurrent obligation to provide equality to students of both sexes" (App. p. 5; U.Ch. Mem. 8/22/15 p. 13; Nw.Mem. 9/19/75 p. 1), the complaints were dismissed for failure to state a claim upon which relief could be granted because Title IX does not authorize a private right of action. The cases were consolidated for briefing and argument on appeal. The court of appeals affirmed, holding that Title IX does not permit a private action by an individual. (App. pp. 1-2). On rehearing, the federal respondents reversed the position previously asserted and supported petitioner's claim that a private right of action should be implied under Title IX.

INTRODUCTION AND SUMMARY OF ARGUMENT

The importance of the national effort to promote equal opportunities for all persons is clear. The importance of equal access to education in that effort has been abundantly established. This case presents to the Court, as a matter of first impression, the question of whether the primary federal statute prohibiting sex discrimination in education programs receiving federal financial assistance may be enforced by private parties in the federal courts, at least where the administrative enforcement capability of HEW is inadequate or unavailable.

Appropriately, the principle embodied in the published policies of the respondent schools here at issue is at the heart of

the national effort to eliminate unreasonable sex discrimination. Exclusionary policies which utilize gender or race as express terms have been generally eliminated through federal civil rights enforcement efforts under Title IX and Title VI, respectively. When the relative academic and career patterns of men and women are examined it becomes clear that the respondent schools' admission policies could not be more calculatedly aimed at excluding women without using gender as an express term. Virtually all medical schools have comparable policies as do many other graduate and professional schools.¹ The effect of such continued sex discrimination by medical schools has been devastating in that now, over seven years after explicit congressional prohibition of sex discrimination in admissions to medical schools, even though almost 50% of college graduates and about 85% of the personnel in the health care field are women, only about 20% of entering medical students are women.²

In her Epilogue to the Tenth Anniversary Edition of "the book that started it all," *THE FEMININE MYSTIQUE*, (W.W.

¹ According to data published by the Association of American Medical Colleges applicants to U.S. medical schools adversely affected by policies discriminating against persons over a specified age, ranging generally from 27 to 30, numbered about 4,000 in 1974 alone. To this must be added otherwise qualified potential applicants who were deterred by the chilling effect of such published policies. Petitioner alleged that such persons are disproportionately female and proffered statistical data to support that claim. The basic explanation is simple. Many women interrupt their education to marry and raise children before completing graduate or professional education. For example, the percentage of students for whom the lapse of time from receipt of a baccalaureate degree to the commencement of graduate study is 10 years or more is 2½ times as great for women as for men. Marriage and children are the reasons most often cited by women for the interruption of education but rarely cited by men.

² Section 799A, Public Health Service Act, 42 U.S.C. § 295h-9 was enacted in 1971. Title IX was enacted the following year. Shelton & Berndt, "Sex Discrimination in Vocational Education: Title IX and Other Remedies," 62 *Calif. L. Rev.* 1171 (1974).

Norton & Co., New York, 1963, 1974) Betty Friedan reported application of a similar "age" policy by the department of Psychology at Columbia University as an incident which led to formation of the National Organization for Women. Sociological and statistical support for the significance and importance of petitioner's claim has been well documented. See *e.g.* WALSH, *DOCTORS WANTED, NO WOMEN NEED APPLY*, (Yale Univ. Press 1977); HARRIS, *THE PRIME OF MS. AMERICA*, (G. P. Putnam's Sons, New York, 1975); and ASTIN, *THE WOMAN DOCTORATE IN AMERICA*, (Russell Sage Foundation, New York 1969).

Title IX creates an individual private right of action to remedy such discrimination and the applicable HEW regulation, 45 C.F.R. § 86.21(b)(2), provides explicit guidance for evaluation of the admission policy in question.³ Title IX was patterned precisely after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* When Title IX was enacted the courts already had held that a private right of action existed under Title VI. Congress intended Title IX to have enforcement rights identical to its predecessor legislation, Title VI. Substantial legislative history demonstrates that congressional intent.

Congressional intent to permit a private right of action under Title IX has been affirmed by at least three subsequent declarations of Congress. First, legislative history of the 1974 amendment of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, expressly stated that both Title VI and Title IX "permit a judicial remedy through a private action." Second, legislative history of the Age Discrimination Act of 1975, 42

³ Support for the merits of petitioner's age discrimination claim on equal protection and due process principles, apart from the disparate impact on women, may be found in *THE AGE DISCRIMINATION STUDY, A Report of the United States Commission on Civil Rights* (December, 1977) *N.B. Findings* Nos. 2, (p.24), 18 (p.76), Conclusion (pp. 78-81) and Recommendation No. 12 (p.101).

U.S.C. § 6101 *et seq.*, again expressly confirmed the congressional view that legislation patterned on Title VI provides a private right of action requiring an express negation when not applicable. Third, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, allows awards of attorneys fees to successful private plaintiffs specifically in Title IX actions. The legislative history of that Act as well as the statutory provision itself expressly reflected congressional intent to encourage individual private actions under Title IX. This Court consistently has held that such subsequent declarations and acts of Congress must be given great weight and may be virtually conclusive in construing an earlier statute.

Precedents for a private right of action under Title VI cannot be distinguished. Plaintiff has stated a claim under Title IX, and her complaints may not be dismissed on the basis of a defendant's unproven assertions.

ARGUMENT

1. Title IX was patterned on Title VI and substantial legislative history confirms a private right of action.

The question of private enforceability of section 901 of Title IX relates directly to the enforceability of two other federal laws which are worded identically, namely section 601 of Title VI which prohibits discrimination on the ground of race, color or national origin in any program receiving federal financial assistance, and section 504 of the Rehabilitation Act of 1973, which prohibits discrimination in such programs solely by reason of a handicap.⁴ Title IX was patterned on Title VI, and

⁴ While the decision on rehearing was pending, another panel of the Seventh Circuit in *Lloyd v. RTA*, 548 F.2d 1277 (7th Cir. 1977) held that section 504 was enforceable against defendants to whom 42 U.S.C. § 1983 did not apply. On rehearing, the court below distinguished *Lloyd* on the ground that Congress provided no remedy at all for section 504, overlooking the finding in *Lloyd* that the legislative history expressly contemplated administrative regulations and enforcement comparable to Title VI and Title IX. Cf. 559 F.2d at 1082 (Pet. Cert. p. A-32) and 548 F.2d at 1281-82 n.15, 1285. The

(Footnote continued on following page.)

section 504 in turn was patterned on Title VI and Title IX. These laws differ only in the types of discrimination and programs covered by each. The HEW regulation for evaluation of admission policies having the disproportionate impact claimed by petitioner is squarely applicable. 45 C.F.R. § 86.21(b)(2)

The identity of the legislative scheme in Title VI and Title IX was obvious and deliberate. Legislative history is replete with reference to such identity. Representative O'Hara later explained that Title IX was so patterned after Title VI that in its initial House consideration the bill was prepared "from a retyped, slightly altered Xerox copy" of Title VI. He declared: "Now, you tell me a clearer case of a Congress intending to do exactly the same thing with one law as they did with another." *Hearings on H. Con. Res. 330 before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor*, 94th Congress, 1st Session, at 16 (1975).

Well established doctrine of course required that legislators and draftsmen, noting the more than fifty decisions reported under Title VI prior to the enactment of Title IX in 1972 where violation of both the Constitution and the statute was charged, to conclude that the courts acted under the statute whenever the statute and guidelines were dispositive. See Annotations, 42 U.S.C.A. § 2000d *et seq.*

Between the enactment of Title VI in 1964 and Title IX in 1972, courts of appeals for at least three circuits expressly had construed Title VI to create a private cause of action. No contrary construction has been found.

Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967), left no doubt that

(Footnote continued from preceding page.)

enforcement provisions of the HEW regulations for both Title IX and section 504 are identical. Both simply incorporate by reference the enforcement provisions for Title VI. 45 C.F.R. § 84.61 and 45 C.F.R. § 86.71.

Title VI's language allowed a private right of action in circumstances where section 1983 and the Constitution could not apply directly. *Bossier* was so understood by HEW. (Opinion dated 9/17/74, Pet. Cert. pp A-36).

In *Kelley v. Altheimer, Arkansas Pub. School Dist. No. 22*, 378 F.2d 483, 492 (8th Cir. 1967), the court stated, "Regardless of the steps which may be taken by HEW to secure compliance, we will not avoid our responsibility in the matter."

Cypress v. Newport News Gen'l and Nonsect. Hosp. Assoc., 375 F.2d 648, 660 (4th Cir. 1967), held;

"One is not yet in a position to predict with confidence when, if at all, the HEW carrot will have its hoped for effect. In the meantime, it would be fatuous for courts to abstain where the right to relief has been abundantly proved."

Subsequent to the enactment of Title IX, Congress, in three separate instances, confirmed its understanding that section 901 is privately enforceable. The prior construction of Title VI applies to Title IX. See *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315 (1938); *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943); *United States v. Dixon*, 347 U.S. 381 (1954).

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizes the award of attorney's fees in any action to enforce specified civil rights laws, including Title VI and Title IX. Virtually every congressman who spoke on the attorney's fees act strongly reflected the understanding that Title VI and Title IX were enforceable in private actions.⁵ That

⁵ See: 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16251 report of Sen. H. Scott and S.16252 report of Sen. Kennedy and (daily ed. Oct. 1, 1976) H.12159 report of Rep. Drinan. See also: 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16262 remarks of Sen. Allen, (daily ed. Sept. 22, 1976) S.16431 remarks of Sen. Hathaway, (daily ed. Sept. 29, 1976) S.17051 remarks of Sen. Tunney, S.17052 remarks of Sen. Abourezk, (daily ed. Oct. 1, 1976) H.12152 *et seq.* colloquy

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Act confirmed the earlier congressional declarations that Title VI and Title IX "permit a judicial remedy through a private action," made in connection with amendment of the Rehabilitation Act of 1973, 1974 U.S. Code Cong. and Adm. News 6390-91, and that, absent *express* negation, legislation patterned on Title VI contemplated "a private right to such a remedy through civil suit," made in connection with the Age Discrimination Act, 1975 U.S. Code Cong. and Adm. News 1324. Such congressional declarations of the private enforceability of Title VI and Title IX followed this Court's statement of the enforceability of Title VI in *Lau v. Nichols*, 414 U.S. 563 (1974). That Congress intended Title IX to be enforceable in the same manner as Title VI is clear beyond question.

This Court has held that such subsequent declarations by Congress must be given "great weight" and may be "virtually conclusive." *New York, Phila. & Norfolk R.R. v. Peninsula Produce Exchange*, 240 U.S. 34, 39 (1916); *Sioux Tribe v. United States*, 316 U.S. 317, 329-30 (1942).

As stated in *Brown v. General Services Administration*, 425 U.S. 820, 828 (1976),

"the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."

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among Reps. Quie, Drinan, Anderson and Bauman. H.12161 remarks of Rep. Railsback, H.12165 remarks of Rep. Sieberling and H.12164 remarks of Rep. Holzman.

The opinion on rehearing concluded that Title IX was specified in the act "merely to provide for the possibility that some court might deem it appropriate in the future to imply a private right of action from the provisions of Title IX." 559 F.2d at 1080 (Pet. Cert. p.A-27). However, that construction presumes inclusion of Title VI and Title IX in the act either invited judicial interpretation contrary to the intent of Congress or is a nullity. At the very least the attorney's fees act demonstrates that a private right of action under Title VI or Title IX would not conflict with congressional intent. Such asserted conflict, however, was the basis for the denial of such a right of action in the decision below.

The Senate Report on the attorney's fees act stated, "These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation while at the same time limiting the growth of the enforcement bureaucracy." 1976 U.S. Code Cong. and Adm. News 5911. This matter provides an apt illustration. On June 2, 1976, 15 months after filing, the regional office of HEW advised petitioner that her claims present issues "of first impression and national in scope." (Pet. Cert. p. A-35). She has received no further communication on her administrative complaints. While HEW has recognized a responsibility to investigate individual complaints, it is not capable of fully processing each individual complaint with its available staff and funding.⁶

The Title IX regulations, like the Title VI regulations, permit participation by an individual complainant at the discretion of HEW but they do not afford the individual any right to participate. Termination of federal assistance, without more, provides punishment of an offending recipient instead of a remedy to an aggrieved individual. Specific enforcement of contractual assurances against discrimination is a far more appropriate remedy for valid individual complaints. The position of HEW on rehearing and in this Court, supporting a private right of action under Title IX, accords with the long-standing opinion of departmental counsel dated September 17, 1974, a copy of which is set out in the Appendix to Petition for Certiorari. (p. A-36).⁷

⁶ See *Rosado v. Wyman*, 397 U.S. 397 (1970), *Allen v. State Board of Elections*, 393 U.S. 544, 556 (1969). HEW Secretary Mathews confirmed that "current and projected staff resources will still be inadequate simultaneously to eliminate the complaint backlog, to resolve all incoming complaints on a timely basis, and to fulfill other essential enforcement responsibilities." 41 Fed. Reg. 18394 (1976).

⁷ Senator Birch Bayh, one of the principal congressional sponsors of Title IX, and Nels Ackerson, legislative assistant to the Senator, were of counsel on the brief for petitioner on rehearing in the Seventh Circuit. A more extensive review of legislative history and authorities cited in the foregoing argument may be found in said brief.

2. The decision below conflicts with applicable decisions of this Court pertaining to discrimination on the basis of race, color or national origin, and related issues.

Denial of a private right of action in the circumstances of this case conflicts with applicable decisions of this Court in three respects.

First, in *Lau v. Nichols*, 414 U.S. 563 (1974), this Court recognized the private enforceability of Title VI as follows:

"We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 [of Title VI] to reverse the Court of Appeals." 414 U.S. at 566.

In separate concurring opinions Mr. Justice Blackmun referred to enforcement of "the statute and the guidelines," 414 U.S. at 572, and Mr. Justice Stewart noted the absence of challenge to plaintiffs' right to enforce Title VI assurances in the defendants' federal funding contract as third party beneficiaries, 414 U.S. at 571 n. 2.⁸

The decision below distinguished *Lau* with the unprecedented ruling that federal courts may imply jurisdiction under Title VI or Title IX for actions by "large groups" claiming race or sex based discrimination but not for individual actions.⁹ Such distinction, however, fails to recognize that a suit for violation of Title VI or Title IX is necessarily in the nature of a class action: the evil sought to be ended is discrimination on the basis

⁸ See: *Euresti v. Stenner*, 458 F.2d 1115 (10th Cir. 1972); *Poirrier v. St. James Parish Police Jury*, 372 F.Supp. 1021 (E.D.La. 1974). To the extent state law controls the third party beneficiary issue, *Miree v. DeKalb County Georgia*, 433 U.S. 25 (1977), Illinois law clearly permits enforcement of contract by third party beneficiaries. *Illinois Law and Practice*, Vol. 12, p. 443, Contracts, § 265 (West Pub. Co.)

⁹ 559 F.2d at 1072, 1074 N. 16, 1083. (Pet. Cert. pp. A-12, A-16 N. 16, A-33).

of a class characteristic, i.e. race, color, national origin or sex. The distinction also overlooks the central role of *stare decisis* in our legal system. By so limiting access to the courts, it runs contrary to American tradition that civil rights are basically individual rights.

Recently, in *Regents of the University of California v. Bakke*, No. 76-811, four Justices expressly based their decision on the enforceability of Title VI. Four others expressly assumed Title VI was enforceable. Such action would have little meaning in that suit by an individual if the decision below had correctly distinguished *Lau* as being dependent upon the large number of plaintiffs. Such action by this Court also rejects the alternative distinction asserted in the decision below that *Lau* and other decisions of lower federal courts which involved both constitutional and statutory claims under Title VI, were decided under the Constitution. Exactly the opposite conclusion, namely that to the extent of any difference such cases were decided under the statute and the guidelines, accords with such action by this Court in *Bakke* and the well established policy of deciding cases on non-constitutional grounds if possible.

Second, the decision below conflicts with the decision of this Court in *Cort v. Ash*, 422 U.S. 66 (1974). That decision articulated four factors pertinent to implying a private cause of action under a federal statute which does not expressly provide such a remedy.¹⁰

¹⁰ Historically discriminatory state action has been remedied by the federal judiciary under the authorization of section 1983 and discriminatory federal action under implied authorization. *Brown v. Board of Education*, 347 U.S. 497 (1954), *Bolling v. Sharpe*, 347 U.S. 497 (1954). See the analysis of *Cort* offered with suggestion for clarifying emphasis in this case in Note, "Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View," 87 *Yale L. J.* 1378 (1978). See also Note, "Private Rights of Action Under Title IX," 13 *Harv. C.R.-C.L. L. Rev.* (1978) (in press). Section 1983 is not a jurisdictional statute and it has no counterpart expressly authorizing private suits to remedy discriminatory federal action.

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With respect to the most pertinent factor of whether there is an indication of legislative intent to permit or deny such a remedy, *Cort* stated that where federal law has granted a class of persons certain rights—as do both Title VI and Title IX by utilizing the language “No person in the United States shall . . . be excluded”—it is not necessary to create a private cause of action, although an explicit purpose to deny such a cause of action would be controlling.¹¹ 422 U.S. at 82. No purpose to deny a cause of action is evident in either Title VI or Title IX except with respect to the last resort remedy of administrative fund cutoff. Any such purpose would preclude the courts from deciding cases under Title VI or Title IX where federal jurisdiction had been claimed on some other basis such as “state action” under 42 U.S.C. § 1983, because Congress applied the same policy in the same words to both state and private recipients of federal financial assistance in both statutes. Yet the court of appeals on rehearing adopted such an alternative distinction for *Lau* and the multitude of other decisions which permitted private actions under Title VI.¹²

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Blue v. Craig, 505 F.2d 830 (4th Cir. 1974). Authorization in the case of federal action is implicit. Mere provision for some administrative procedure to implement congressional policy generally has not been held to evidence an intention to preclude a judicial remedy. Administrative enforcement also is available in the situations where a judicial remedy has been most frequently implied. Note, “Implying Civil Remedies from Federal Regulatory Statutes,” 77 *Harv. L. Rev.* 285 (1963).

¹¹ In *Bakke*, Mr. Justice Stevens joined by The Chief Justice, Mr. Justice Stewart and Mr. Justice Rehnquist found it, “clear that Congress had no intention to foreclose a private right of action,” n.28. Mr. Justice White disagreed. Mr. Justice Powell, with whom Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun concurred in this respect, did not address this “difficult issue” and assumed only for purposes of that case that an individual has a right of action under Title VI. (Part II A.).

¹² 559 F.2d at 1083 (Pet. Cert. p. A-33-34). See annotations for Title VI, 42 U.S.C.A. § 2000d *et seq.* Analytically, the distinctions of

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The identical legislative scheme cannot mean one thing in the case of a state program and something else in the case of other programs.¹³ Congress applied the same policy and the same administrative procedures to *any* program receiving federal financial assistance. To conclude that Title VI meant to limit individual actions already expressly authorized under section 1983 would turn that historic legislation on its head by using Title VI to limit section 1983. It would convert what Congress intended as a charter for liberty into further shackles for the victims of discrimination.¹⁴ It would mock the Presidential

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Lau on constitutional and state action grounds are the same because 42 U.S.C. § 1983 by its terms requires violation of civil rights afforded by the Constitution and laws of the United States. If judicial enforcement of Title VI or Title IX would conflict with the intent of Congress, such laws could not trigger the operation of section 1983, thus leaving only the constitutional argument. This Court, however, expressly declined to reach the Equal Protection Clause argument in *Lau* and relied solely on section 601, the statute and its guidelines or third party beneficiary enforcement of the Title VI assurances in defendants' federal funding contract. All apply in this case.

¹³ For medical schools, among others, the amount of federal assistance may be substantially greater in the latter case.

¹⁴ The extended colloquy among Sens. Stennis, Humphrey, Case and Keating clearly established that any such construction must be avoided. 110 Cong. Rec. 5224—5662 (1964). In *U.S. v. Frazer*, 317 F.Supp. 1079, 1083 (M.D. Ala. 1970), Chief Judge Frank M. Johnson, Jr. set out a ringing affirmation of their success. Sen. Case's point that the limitations on administrative action in section 602 do not limit the express application of the policy of section 601 to *any* program receiving federal assistance was later reflected in the removal of guaranty assistance from the draft section 602 then under discussion to a new and separate section 605 applicable to the full title. The elaborate safeguards of section 2 were directed to the potential for “dictatorial” abuse of the *administrative* fund cutoff authorization. By their terms, they do not apply to enforcement “by any other means”—even by the agency.

statements offered in support of Title VI:

"Wherever Federal funds are expended for anything, I do not see how any American can justify—legally, or logically, or morally—a discrimination in the expenditure of those funds as among our citizens."

President Dwight D. Eisenhower¹⁵

"I don't think we should extend Federal programs in a way which encourages or really permits discrimination. That is very clear."

President John F. Kennedy¹⁶

The manifest intent of Title VI was to extend civil rights enforcement. Express authorization in Titles II and VII for a private action against privately owned public accommodations and private employers which do not receive any federal, state or local financial assistance, while exempting *any* program receiving federal financial assistance in Title VI, would have been an outrage in the situation sense of the Civil Rights Act of 1964.¹⁷ To infer it *sub silentio* is unthinkable.

The three other factors specified in *Cort* all confirm that a private right of action should be implied: petitioner is within the

¹⁵ Quoted by Sen. Kuchel, 110 Cong. Rec. 6561.

¹⁶ Quoted by Sen. Pastore, 110 Cong. Rec. 7067.

¹⁷ Ironically, isolated remarks by Sens. Kuchel and Keating and Cong. Gill, 110 Cong. Rec. 7065, 6562 and 2467, respectively, considered out of the context of the debates, could appear to support argument against a private right of action. Actually, such remarks were directed to the fund cutoff remedy as a parry to claims by opponents that Title VI was unnecessary. See eg. remarks of Sen. Talmadge. "The people have the authority to go to court, and the Senator admits that they have that right." 110 Cong. Rec. 5254. All such remarks of both the proponents and the opponents thus confirm a private right of action except with respect to the "last resort" of *administrative* fund cutoff which was perceived as open to "dictatorial" abuse. That Congress intended Title VI *first* to end discrimination in federally assisted programs and only as a *last resort* to cut off funds to the recalcitrant was repeatedly emphasized in the debates in both houses.

class for whose *especial* benefit Title IX was enacted; the federal respondents have confirmed that her private action would not conflict with their administrative efforts but instead provide appropriate support; and civil rights have not been traditionally relegated to state law.

Finally, the decision below conflicts with the decision of this Court in *Conley v. Gibson*, 355 U.S. 41 (1957), that "a complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. Specifically, the court of appeals, in conflict with *Conley*:

(i) adopted one respondent school's vague and unproven suggestion that admission of petitioner would require discrimination against better qualified applicants¹⁸ instead of petitioner's verified allegation, based upon data published by the school, that she had higher academic qualifications than a substantial number of its accepted students;¹⁹

(ii) overlooked petitioner's claim that she is within a large class of women against whom respondents discriminate on the basis of sex;

¹⁸ Such suggestion was made only on behalf of the Univ. of Chicago respondents. The Northwestern respondents had acknowledged in writing that their age policy was involved in denial of petitioner's application. (App.p.10). The credentials statement noted in the complaint (App.p.10) was in a printed form letter. The age limit note was handwritten on the form letter.

¹⁹ (App. pp 6-7). Based upon the data cited in the complaint and the median GPA of 3.55 and average MCAT of 620 for accepted students published for the U. Chi. medical school in "Medical School Admission Requirements 1975-76," Association of American Medical Colleges, petitioner estimated that her grade point average at the time of application and her medical college admission test scores were higher than at least 25% of the students accepted by the school and that her final grade point average was higher than at least 50% of the accepted students at that school.

(iii) rejected petitioner's claim under 42 U.S.C. § 1983 that, in order to obtain state assistance,²⁰ both respondent schools preferred Illinois residents contrary to what school administrators would decide on the basis of academic policy on the ground that facts cited by petitioner to evidence such policy "may be" related to other factors²¹, and

(iv) initially held, without explanation, that delay of "about one year" in administrative action by HEW on petitioner's Title IX claim was not unreasonable and, on rehearing, after such delay had exceeded 2½ years and

²⁰ Petitioner claimed that each medical school is operated predominately from governmental funds. The U. Chi. medical school admitted direct state aid amounting to more than \$9,600 per Illinois student per year. Tuition and fees were less than \$3,300 at that time. The \$400 per graduate discussed by Judge Friendly in *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973), as adequate state involvement to invoke section 1983 in the case of a discriminatory admissions policy, pales into insignificance by comparison. Federal financial assistance creating Title IX obligations was acknowledged by both schools but the amount was not disclosed. Federal assistance is subject to state control under the Public Health Service Act. See *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 966-69 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964) which was repeatedly noted with approval in the Title VI debates.

²¹ 559 F.2d at 1069n.7. (Pet. Cert. p. A-6n. 7). Cf. 559 F.2d at 1072n.9, 1083. (Pet. Cert. pp. A-11n.9, A-33-34). Under *Conley* the court was required to determine that the preference "must be" related to such other factors and "could not be" related to the state action as claimed by petitioner. It did not and could not do so on the Record. Petitioner's § 1983 claims included violation of the Equal Protection Clause as well as Title IX. Moreover, to the extent that some form of pendant enforcement of Title VI or Title IX might be permitted even if inconsistent with the legislative scheme, it also should be noted that the defendant schools in answering the petition for rehearing, admitted that the procedural basis on which the Seventh Circuit ultimately resolved petitioner's claim under the Age Discrimination in Employment Act, 29 U.S.C. § 626(c), was simply wrong on the facts. (Cf. 559 F.2d at 1076-77, Pet. Cert. p. A-19 and R. Jt. Ans. 9/27/76 p.10).

HEW had supported petitioner, claimed that administrative enforcement of Title IX had not been "given an opportunity to work".²²

Thus, the court of appeals decided the important question of women's rights under federal law presented by this case in conflict with applicable decisions of this Court in *Lau*, *Cort* and *Conley*.

By denying to women seeking enforcement of rights secured by Title IX the same procedure afforded by the decisions of this Court in *Lau* and *Bakke* for rights secured by Title VI, the decision below rejected the substantial legislative history and obvious identity of language that compel similar interpretation. The distinction of *Lau* on the basis of the number of plaintiffs is unprecedented and contrary to American legal tradition. The alternative distinction on state action and constitutional grounds fails to account for Congress' adoption of the same policy for all specified programs receiving federal financial assistance, state or private, and the pointed reliance by this Court in *Lau* on the statute and the guidelines or the related federal funding contract instead of the Equal Protection Clause. All three apply in this case.

From a policy viewpoint, litigation involving Equal Protection Clause arguments related to more specific Title VI or Title IX guidelines in the case of state schools and programs certainly should be resolved short of the constitutional grounds, as in

²² 559 F.2d at 1077, 1082. (Pet. Cert. pp. A-20, A-32). Lack of prompt outside enforcement by HEW and the courts cannot help but tempt recipients to delay the institution of meaningful internal procedures to resolve claims of discrimination, thereby increasing the substantial HEW administrative backlog and creating constitutional litigation for the courts on matters which could be resolved under the statute and regulations as in *Lau*. More importantly, neglect of prompt enforcement, for whatever reason, permits continued federal subsidy of discrimination in defiance of national policy. There is no reason to anticipate that difficult, multitudinous or frivolous litigation will be peculiar to Title IX.

Lau. There is no reason for the federal courts to embark on complicated determinations of whether applicable HEW regulations, which undoubtedly will become more specific with experience, are *required* by the Constitution. Cases such as *Bakke* are peculiar in this respect and illustrate the point. Yet the legislative scheme urged in the courts below would require precisely such difficult constitutional judgments in all such cases. Determination of whether the guidelines comport with the statutes certainly is a preferable standard from the standpoint of judicial economy let alone the basic national policy of the civil rights statutes themselves.

3. Alternatively, denial of the administrative relief sought against HEW was incorrect.

It is fundamental that the meaning of unreasonable delay or withholding of administrative action under the Administrative Procedures Act, 5 U.S.C. § 706, is related directly to the exclusive or supplemental nature of the remedy provided by the administrative action sought. If there is no private right of action against the schools under Title IX, there must be recourse against HEW for the exclusive remedy it must provide thereunder. In dismissing HEW *sua sponte*, the district court noted that prompt administrative action had been scheduled for "the first half of January, 1976." (App. p. 49).

Petitioner continues to await agency action after more than three years. Cervantes observed that a traveler on "the road of by and by" soon finds "the land of never".

CONCLUSION

For the foregoing reasons, the judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be reversed and each action remanded to the United States District Court for the Northern District of Illinois with instructions to reach the merits.

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No. 77-926

MICHAEL RUBAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

GERALDINE G. CANNON, PETITIONER

v.

THE UNIVERSITY OF CHICAGO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON, PETITIONER

v.

THE UNIVERSITY OF CHICAGO, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A-2 to A-21) is reported at 559 F.2d 1063. The opinion on rehearing (Pet. App. A-22 to A-34) is reported at 559 F.2d 1077. The memorandum of decision of the district court is reported at 406 F. Supp. 1257.¹

¹ The district court's memorandum is not reproduced in either the appendix to the petition or the Appendix in this Court.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1976. The court's opinion on rehearing was issued on August 9, 1977. A timely petition for rehearing was denied on October 3, 1977. The petition for a writ of certiorari was filed on December 28, 1977, and granted on July 3, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 901(a) of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides in pertinent part:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

QUESTION PRESENTED

Whether a private person may sue a private recipient of federal financial assistance to enforce the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

STATEMENT

Petitioner initially brought these actions against the private respondents, the University of Chicago, Northwestern University, and various individual officers of those institutions. She later joined as "additional parties" the Secretary of Health, Educa-

tion, and Welfare and the Region V Director of HEW's Office for Civil Rights.² Petitioner alleged that she had been discriminatorily denied admission to respondents' medical schools on the basis of sex, in violation of Section 901(a) of the Education Amendments of 1972, 20 U.S.C. 1681(a).³ Petitioner sought injunctions directing respondent universities to reevaluate her medical school applications and to admit her to medical school. She also sought declaratory relief and damages. Alternatively, she asked the district court to compel the Secretary to act favorably in response to her administrative complaints.⁴

The district court dismissed petitioner's suits for failure to state a claim upon which relief could be

² Petitioner's amended complaints joined the federal parties in an "unaligned" capacity. The complaints stated (A. 5): "[Petitioner] believes the Secretary and the Regional Director may be aligned as plaintiffs in this case and, unless the context otherwise requires, said officials are not included in the term 'defendants' as used herein."

³ Petitioner also alleged violations of several other federal statutes (see Pet. App. A-4). She does not pursue these allegations here.

⁴ Petitioner stated that she filed written complaints with the Secretary and Regional Director five months before her amended district court complaints, but that "no investigation or related administrative action has been taken" (A. 16). She asked for an injunction "prohibiting the Secretary and the Regional Director from continuing to fail to investigate promptly and take appropriate related administrative and enforcement actions, including conciliation and efforts to effect voluntary compliance" (A. 19).

granted (406 F. Supp. 1257).⁵ The court held, *inter alia*, that Title IX does not authorize a private right of action against recipients of federal financial assistance (*id.* at 1259). The court also held that, since HEW had scheduled an investigation in response to petitioner's sex discrimination complaint, available administrative remedies had not been exhausted and agency action was not final for purposes of judicial review (*id.* at 1260).

The court of appeals affirmed (Pet. App. A-1 to A-21). Relying heavily on the administrative enforcement scheme provided in Section 902 of the Education Amendments, the court held that "construing Title IX to provide a private cause of action before the administrative remedy has been exhausted would be to violate the intent of Congress" (Pet. App. A-12 to A-13).⁶ The court stressed that the legislative history of Title IX contains no mention of private suits as a permissible means of enforcement. In the court of appeals' view, recent decisions of this Court "teach[] * * * that a private cause

⁵ The reported opinion deals only with the complaint against the University of Chicago and its officers. The complaint against Northwestern University was subsequently dismissed in reliance on the earlier opinion.

⁶ Read as a whole, the court of appeals' opinion plainly reveals an intention to deny the existence of any private right of action for an individual complainant under Title IX, not simply to postpone private litigation until a complainant has attempted unsuccessfully to obtain relief through administrative channels.

⁷ *Cort v. Ash*, 422 U.S. 66 (1975); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*, 414 U.S. 453 (1974).

of action should not be lightly implied under a statute where Congress has not specifically provided one—especially where Congress has provided for other means of enforcement" (*id.* at A-15). The court stated, however, that Title IX might permit private litigation "challenging wholesale sexual discrimination against a large number of men or women by a particular educational institution" (*id.* at A-16). The court made this observation in response to petitioner's argument that Title IX was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-4, and that Title VI provides a private right of action for victims of racial discrimination in federally funded programs. Petitioner cited earlier decisions apparently approving federal private suits under Title VI,⁸ but the court of appeals distinguished these cases on the ground that they each "involved an attempt by a large number of plaintiffs to enforce a national constitutional right" (Pet. App. at A-12). The court ruled that the cases cited "do not give any real support to [petitioner's] argument that we must infer an individual right of action under Title IX in favor of a person who has a grievance based upon sexual discrimination against a private educational institution receiving government funds" (*ibid.*).

After the panel issued its original opinion, Congress passed the Civil Rights Attorney's Fees Award

⁸ *Lau v. Nichols*, 414 U.S. 563 (1974); *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).

Act of 1976, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988). In pertinent part, that statute authorizes the award of attorneys' fees to the prevailing party in actions brought to enforce the provisions of Title IX. Principally in order to give the parties an opportunity to discuss the possible implications of the Attorney's Fees Awards Act, the court of appeals granted rehearing limited to the question "whether a private right of action lies under Title IX" (Pet. App. A-23). On rehearing, the federal respondents supported petitioner.⁹ Nevertheless, the panel adhered to its original holding that "implication of a private judicial remedy would be inconsistent with the legislative intent and underlying purposes of the statutory scheme" (Pet. App. A-29).

The court reiterated its view that "Congress' express provision of a sophisticated scheme of administrative enforcement should be construed as an indication of an implicit legislative intent to exclude any private judicial remedies for violations of Title IX other than the judicial review mechanism Congress made available to private parties in the statute" (Pet. App. A-32). The court acknowledged that it might

⁹ As reflected in a September 1974 letter from the Assistant General Counsel of HEW (Pet. App. A-36 to A-38), the Secretary's views on rehearing corresponded with the longstanding HEW position regarding Title IX. The failure of the federal respondents to endorse this position earlier in this litigation is attributable to communication lapses between national and regional HEW offices, not to any eleventh hour policy shift.

take a different view of the matter if the available administrative remedies had proven "wholly inadequate" to the task of protecting the rights guaranteed by Title IX. On the record in this case, however, the court remained unpersuaded that a private right of action is necessary to effectuate the purposes of the legislative scheme (*ibid.*). After canvassing the legislative history of the Attorney's Fees Awards Act, the court concluded that the Act's explicit inclusion of Title IX is not evidence of a pre-existing congressional intent to create a private right of action under that statute, but rather "was intended merely to provide for the possibility that some court might deem it appropriate in the future to imply a private right of action from the provisions of Title IX" (*id.* at A-27). Finally, the court commented further on cases cited by petitioner in support of her argument that a private right of action has been recognized under Title VI of the Civil Rights Act and that private suits similarly should be permitted under Title IX, since the latter statute was specifically patterned on the former. The court stated that, in its reading, all the cases cited actually involved suits against public entities under 42 U.S.C. 1983, and therefore did not address the question whether an implied private right of action lies directly under Title VI (Pet. App. A-31 n.6, A-33 to A-34).

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 prohibits sex discrimination in many federally

funded education programs. Section 901 of the Amendments, 20 U.S.C. 1681, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." Section 901 then lists a number of exceptions to which this general provision does not apply. None of these exceptions is relevant here, and Section 901(a)(1) makes clear that the prohibition against discrimination on the basis of sex is intended to cover professional school admissions.¹⁰

Section 902 of the Amendments, 20 U.S.C. 1682, establishes an administrative enforcement scheme under which funding agencies may terminate or refuse to grant federal financial assistance to educational institutions that discriminate on the basis of sex in violation of Title IX. Under this scheme, funding agencies are directed to issue rules and regulations designed to effectuate the provisions of Section 901. Such rules and regulations may not become effective unless and until approved by the President. Once the rules and regulations have received such approval, compliance may be effected either by the termination or refusal of funds or by "any other

¹⁰ Section 901(a)(1) states: "[I]n regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."

means authorized by law." Section 902 provides, however, that no such enforcement action shall be taken "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." Section 902 further provides that federal funding shall not be refused or terminated without "an express finding on the record, after opportunity for hearing," that the recipient has not complied with Section 901 or its implementing regulations. Finally, Section 902 states that no funding termination or refusal shall become effective until 30 days after the relevant congressional committees have received reports from the funding agency explaining "the circumstances and the grounds for such action."

Section 903 of the 1972 Amendments, 20 U.S.C. 1683, provides for judicial review of any department or agency enforcement action taken under Section 902. Section 903 explicitly states that in the case of a refusal or termination of funds "not otherwise subject to judicial review, * * * any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with [the Administrative Procedure Act], and such action shall not be deemed committed to unreviewable agency discretion * * *."

The question presented in this case is whether a private person who allegedly has been the victim of

sex discrimination in a federally funded education program may sue to enforce Title IX's prohibition against such discrimination. The federal respondents support petitioner on this issue for several reasons.

1. First, *Allen v. State Board of Elections*, 393 U.S. 544 (1969), found an implied private right of action under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. (Supp. V) 1973c, a statute whose critical language is similar to that used in Section 901 of the 1972 Education Amendments. This Court held that private suits under Section 5 would assist the Attorney General in carrying out his enforcement responsibilities under the Act and would help ensure that citizens in jurisdictions covered by the Act are not deprived of their right to vote by virtue of a changed "standard, practice, or procedure with respect to voting" that has not received the pre-clearance required by Section 5. Similarly, private suits under Title IX would assist funding agencies in fulfilling their statutory obligation to provide federal financial assistance only to those educational programs that do not discriminate on the basis of sex. At the same time, a private right of action under Title IX would enable individual participants or prospective participants in federally funded education programs to vindicate their right to be free of such discrimination. *Allen* demonstrates that the administrative enforcement mechanism in Section 902 of the Education Amendments should not preclude private suits under Title IX. The Voting Rights Act

of 1965 explicitly authorized the Attorney General to bring suit to enforce Section 5. See 42 U.S.C. 1973j(d). The Act was silent about private litigation. Yet this Court concluded that private persons should be permitted to sue lest the guarantees of Section 5 "prove an empty promise" (393 U.S. at 557). Like considerations support implication of a private right of action under Title IX.

2. The result indicated by *Allen* is also the outcome suggested by a review of the language, legislative history, and judicial interpretation of several other statutes enacted before and after Title IX. Although the contemporaneous legislative history of Title IX itself does not itself contain clear evidence of congressional intent to create or deny a private cause of action, evidence gleaned from a variety of other sources does suggest that Congress intended to permit enforcement through private litigation when it enacted Title IX in 1972.

a. Title IX was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and private persons may sue to enforce Title VI. In *Regents of the University of California v. Bakke*, No. 76-811 (June 28, 1978), four Justices acknowledged that private actions may be maintained under Title VI and four others assumed *arguendo* that such actions are proper. In *Lau v. Nichols*, 414 U.S. 563 (1974), this Court granted relief in a private suit under Title VI, and petitioners' right to bring the action was not challenged. Moreover, numerous lower federal courts have either held or assumed that

Title VI does create a private right of action. Some of these cases were decided before Congress passed Title IX. See, e.g., *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967). In enacting that legislation in 1972 and patterning it after Title VI, Congress acted against a background of judicial approval of private suits under the 1964 law. The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988), provides further evidence of the congressional understanding that private suits may be maintained under both Title VI and Title IX. The Act authorizes an award of attorney's fees to the prevailing party in suits to enforce Title VI, Title IX, and a number of other federal statutes. Although the Act itself does not create a cause of action under Title IX, its language and legislative history demonstrate that many members of Congress assumed such a cause of action already exists.

b. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits discrimination against the handicapped in federally funded programs. The statute's language is very similar to that used in Title VI and Title IX. Notwithstanding the fact that Section 504 does not mention the possibility of enforcement through private litigation, a congressional committee report accompanying clarifying amendments passed one year after the Rehabilitation Act explicitly states that Section 504 "permit[s] a judicial remedy through a private action." S. Rep.

No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974). The report further states that Congress intended implementation of Section 504 to follow the models of Title VI and Title IX. This Court has directed a lower federal court to decide a Section 504 claim in a private suit (see *Campbell v. Kruse*, 434 U.S. 808 (1977)), and other federal courts have expressly approved private actions under Section 504 (see *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977), and cases there cited). These decisions, together with the language and legislative background of Section 504, support implication of a private right of action under Title IX.

c. Title III of the Older Americans Amendments of 1975, 42 U.S.C. (Supp. V) 6101 *et seq.*, prohibits age discrimination in federally funded programs. Section 303 of the Amendments states this general prohibition in language nearly identical to that used in Title VI and Title IX. As part of a legislative compromise, Congress chose to make administrative enforcement, under regulations issued by the Secretary of Health, Education, and Welfare and the heads of other funding agencies, the exclusive remedy under Title III. Section 305(e) of the 1975 Amendments explicitly establishes the exclusivity of administrative remedies under Title III. The lack of any similar provision in Title IX indicates that Congress did not wish to confine Title IX enforcement efforts to the administrative fund termination procedures described in Section 902.

3. A review of the four relevant factors enumerated in *Cort v. Ash*, 422 U.S. 66, 78 (1975), demonstrates that private suits should be permitted under Title IX. That statute was intended to eliminate sex discrimination in federally funded education programs. In particular, it was designed to prohibit discrimination against women. Petitioner is thus a member of the class of persons for whose especial benefit Title IX was enacted. Second, although direct contemporaneous evidence of Congress' intent to create a private right of action under Title IX is lacking, there is also no evidence of any legislative intent to deny such a right. *Cort* specifically recognized that where "it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action" (*id.* at 82). Third, enforcement through private litigation is consistent with the legislative purpose underlying Title IX. Administrative enforcement of the statute is a huge undertaking and is not well suited to redress injuries suffered by individual victims of sex discrimination. Private suits would complement the administrative fund termination procedure and enable those who have been denied the benefits of federally funded education programs on the basis of sex to vindicate their rights under Title IX. Finally, enforcement of Title IX is a uniquely federal concern, not traditionally relegated to state law. The fourth criterion listed in *Cort* therefore supports implication of a private right of action under Title IX.

ARGUMENT

PRIVATE PERSONS MAY SUE TO ENFORCE THE ANTIDISCRIMINATION PROVISIONS OF TITLE IX

I .

THIS COURT'S DECISION IN *ALLEN v. STATE BOARD OF ELECTIONS* SUPPORTS IMPLICATION OF A PRIVATE RIGHT OF ACTION UNDER TITLE IX

Title IX of the 1972 Education Amendments provides that no person may be excluded from participation in a federally funded education program on the basis of sex. The Voting Rights Act of 1965, 42 U.S.C. (and Supp. V) 1973 *et seq.*, provides that no person may be denied the right to vote on the basis of race or color. To implement this general prohibition, Sections 4 and 5 of the Act, 42 U.S.C. (Supp. V) 1973b and 1973c, together provide that certain covered jurisdictions may not enforce changes in their standards, practices, or procedures with respect to voting unless those changes have first been precleared by the United States District Court for the District of Columbia or the Attorney General. Section 5 states that, in jurisdictions included within the coverage formula of Section 4, "*no person shall be denied the right to vote for failure to comply*" with a voting change that has not been precleared (emphasis added). Neither the Voting Rights Act nor Title IX explicitly authorizes private actions to enforce its provisions.

Nevertheless, in *Allen v. State Board of Elections*, 393 U.S. 544, 554-557 (1969), this Court held that a private citizen may sue to enjoin enforcement of voting changes not precleared in accordance with Section 5 of the Voting Rights Act.¹¹ The Court reached this result notwithstanding Congress' express provision for suit by the Attorney General as a means of enforcing Section 5. The Court reasoned that "achievement of the Act's laudable goal could be severely hampered * * * if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General" (*id.* at 556). Stressing the large number of political subdivisions covered by the Voting Rights Act, the Court observed that the Attorney General's limited staff "often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government" (*ibid.*).

Similar reasoning applies to Title IX, a statute enacted three years after *Allen* found an implied private right of action under the "no person" language in Section 5 of the Voting Rights Act. Title IX was intended to eliminate sex discrimination in federally funded education programs. See, *e.g.*, 117 Cong. Rec. 30403 (1971) (Senator Bayh); 118 Cong.

¹¹ In the 1975 extension of the Voting Rights Act, Congress expressly approved the decision in *Allen*. See S. Rep. No. 94-295, 94th Cong., 1st Sess. 16 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 9 (1975).

Rec. 5803 (1972) (Senator Bayh).¹² If Congress' broad remedial purpose is to be realized, enforcement should not be relegated entirely to the administrative fund termination procedure provided in Section 902 of the Education Amendments. The resources of the Department of Health, Education, and Welfare are limited and, although the Department has recently renewed its commitment to vigorous Title IX enforcement efforts (see Statement of Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare, Press Release (June 26, 1978)), private litigation remains an indispensable complement to governmental action if the goals of Title IX are to be achieved. Cf. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210-211 (1972). Private litigation would not only provide an avenue for the vindication of personal rights under Title IX, but it would also aid HEW and other federal agencies in carrying out their statutory obligation to ensure that federal funds are not expended in educational programs that discriminate on the basis of sex. Indeed, if the Court agrees with our interpretation of Title IX in this case, the mere *possibility* of private suits may well prove a more important boon to Title IX enforcement than actual litigation. Authoritative confirmation of a right to challenge Title IX violations in private suits would greatly encourage voluntary compliance with the statute's ban on

¹² Senator Bayh was the principal sponsor of Title IX.

sex discrimination in federally financed education programs.¹³

II

THE LANGUAGE AND JUDICIAL INTERPRETATIONS OF OTHER FEDERAL STATUTES PROHIBITING VARIOUS FORMS OF DISCRIMINATION IN FEDERALLY FUNDED PROGRAMS SUPPORT RECOGNITION OF A PRIVATE RIGHT OF ACTION UNDER TITLE IX

A. A private right of action has been implied under Title VI of the Civil Rights Act of 1964, and Title IX of the 1972 Education Amendments was patterned after Title VI

Title IX is the second in a series of four statutes designed respectively to prohibit discrimination on the basis of race, sex, handicap, and age in federally funded programs. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. (and Supp. V) 2000d *et seq.*;

¹³ The Seventh Circuit in this case is apparently the only court of appeals to date to rule on the existence *vel non* of a private right of action under Title IX. A number of district courts have considered the issue, and the majority have resolved it in the affirmative. Compare *Jones v. American University*, Civ. No. 78-565 (D.D.C. July 27, 1978); *Alexander v. Yale University*, Civ. No. N-77-277 (D. Conn. Dec. 21, 1977); *Grossman v. Texas Tech University*, Civ. No. CA-5-77-23 (N.D. Tex. Nov. 18, 1977); and *Piascik v. Cleveland Museum of Art*, 426 F.Supp. 779, 780-781 & n.1 (N.D. Ohio 1976), with *Lodwig v. Board of Education of Pleasant Local School District*, Civ. No. C-76-604 (N.D. Ohio Mar. 31, 1977), appeal pending, No. 77-3375 (6th Cir.); and *Cape v. Tennessee Secondary School Athletic Association* 424 F.Supp. 732 (E.D. Tenn. 1976), rev'd on other grounds, 563 F.2d 793 (6th Cir. 1977). Cf. *Trent v. Perritt*, 391 F.Supp. 171, 173 (S.D. Miss. 1975) (rejecting Title IX claim on the merits).

Title V of the Rehabilitation Act of 1973, 29 U.S.C. 794; Title III of the Older Americans Amendments of 1975, 42 U.S.C. (Supp. V) 6101 *et seq.* Title IX was avowedly modeled on the first of these statutes, Title VI of the Civil Rights Act of 1964. The 1972 legislation was intended to fill part of the gap left by Title VI's failure to prohibit discrimination on the basis of sex and, in fact, Title IX was originally characterized as an amendment to Title VI. See, e.g., 117 Cong. Rec. 9822 (1971) (Representative Green); *id.* at 30404, 30407-30408 (Senator Bayh); *id.* at 30411 (Senator Cook); 118 Cong. Rec. 5803, 5807 (1972) (Senator Bayh).

1. In *Regents of the University of California v. Bakke*, No. 76-811 (June 28, 1978), the United States argued as amicus curiae that Title VI impliedly authorizes private suits to enforce the statute's prohibition of discrimination on the basis of race, color, or national origin in federally funded programs.¹⁴ See Supplemental Brief for the United States at 26-34. Four Justices adopted this position (see Stevens, J., concurring in the judgment in part and dissenting in part, slip op. 12-14), and four others assumed without deciding that Title VI does

¹⁴ Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

confer a private right of action (see Powell, J., announcing the judgment of the Court, slip op. 12-14; Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting, slip op. 4 & n.8). As Mr. Justice Stevens observed, this Court and numerous lower federal courts have either "concluded or assumed that a private action may be maintained under Title VI" (Stevens, J., slip op. 12). See, e.g., *Lau v. Nichols*, 414 U.S. 563, 566 (1974); *Jefferson v. Hackney*, 406 U.S. 535, 549-550 n.19 (1972); *Uzzell v. Friday*, 547 F.2d 801 (4th Cir.), aff'd en banc, 558 F.2d 727 (1977); *Gilliam v. City of Omaha*, 524 F.2d 1013 (8th Cir. 1975); *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974); *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1138 (2d Cir. 1973); *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).

In *Lau v. Nichols*, *supra*, this Court decided a private Title VI claim on its merits. No question was raised about petitioners' right to sue under the statute. The Court expressly based its decision on Title VI and refused to reach petitioners' Equal Protection Clause argument. *Lau* thus implicitly recognized the legitimacy of private suits under Title VI.¹⁵

¹⁵ Three Justices, concurring in the result in *Lau*, noted that the respondents in that case did not contest the standing of the complainants "to sue as beneficiaries of the federal funding contract" there involved. 414 U.S. at 571 n.2 (Stewart, J., concurring in the result).

2. The court of appeals in the present case rejected petitioners' argument that *Lau* and the other cases cited above support the existence of a private right of action under Title VI and, indirectly, under Title IX as well. The court focused first on Mr. Justice Blackmun's concurring opinion in *Lau*. The relevant portion of that opinion, not joined by any other member of the Court, states (414 U.S. at 571-572):

I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom.
* * *

I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child * * *, I would not regard today's decision * * * as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction.

From these remarks, the court of appeals inferred that *Lau* "does not indicate that Title VI provides a private right of action for each individual discriminatee" (Pet. App. A-12). The court suggested, however, that Title VI and Title IX might support private litigation by large groups of people challenging racial or sexual discrimination in federally funded programs.

There is no basis for the court of appeals' suggestion that the viability of a private suit under Title

VI or Title IX should depend on the number of plaintiffs involved. Mr. Justice Blackmun's concurring opinion in *Lau* simply asserts that the *result* reached by the Court in that case may be explained in part by the number of Chinese children denied supplementary instruction in English. The opinion is subject to two interpretations. It may mean that Mr. Justice Blackmun would have found no Title VI violation if significantly fewer children had been involved. Or it may concern only the appropriate remedy once a Title VI violation has been established, *i.e.*, the opinion may mean that certain kinds of relief, such as mandatory initiation of bilingual instruction in a particular school district, should be awarded only when a sufficient number of persons have been affected by the Title VI violation at issue. Whichever reading is the more accurate, however, the opinion does not contain the slightest hint that a private person's *access to federal court* should turn on his or her ability to identify other persons similarly aggrieved.

On rehearing in the present case, the court of appeals gave a second explanation for its conclusion that *Lau* and the other authorities cited by petitioner provide no support for private suits under Title VI. The court stated that *Lau* and the other cases cited were in fact brought under 42 U.S.C. 1983 and therefore involved no judicial recognition of a private right of action directly under Title VI (Pet. App. A-31 n.6, A-33 to A-34 & n.7). This analysis is inaccurate. While it is true that Section 1983 may be used to

vindicate federal statutory as well as constitutional rights (see, *e.g.*, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972)),¹⁰ at least some of the

¹⁰ Section 1983 provides a cause of action to redress deprivations, under color of state law, of rights, privileges, and immunities secured by the laws of the United States. Federal jurisdiction over at least some such suits is conferred by 28 U.S.C. 1343(3), which covers civil actions to redress deprivations, under color of state law, of rights secured by "any Act of Congress *providing for equal rights* of citizens or of all persons within the jurisdiction of the United States" (emphasis added). Another possible jurisdictional base for Section 1983 suits is 28 U.S.C. 1343(4), which covers actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress *providing for the protection of civil rights*" (emphasis added).

Neither Section 1343(3) nor Section 1343(4) of the Judicial Code contains a jurisdictional amount requirement. Litigants allegedly deprived, under color of state law, of rights secured by federal statutes frequently assert a cause of action under Section 1983 and attempt to invoke federal jurisdiction under 28 U.S.C. 1343(3) or 1343(4), when they are unable to satisfy the \$10,000 jurisdictional amount requirement in the general "federal question" jurisdictional provision, 28 U.S.C. 1331. See, *e.g.*, *Gomez v. Florida State Employment Service*, 417 F.2d 569, 578-580 (5th Cir. 1969). Such attempts to assert jurisdiction under Section 1343(3) or Section 1343(4) sometimes encounter difficulty where the federal statutes conferring the underlying substantive rights arguably are not Acts of Congress "providing for equal rights of citizens or of all persons within the jurisdiction of the United States" or "providing for the protection of civil rights * * *." See, *e.g.*, *Chapman v. Houston Welfare Rights Organization*, No. 77-719 (argued October 2, 1978); *Gonzalez v. Young*, No. 77-5324 (argued October 2, 1978). See also *Hagans v. Lavine*, 415 U.S. 528 (1974); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968) (all involving alleged violations of the Equal Protection Clause "substantial" enough

cited cases upholding private suits under Title VI do not even mention Section 1983. For example, the court of appeals' opinion in *Bossier Parish School Board v. Lemon*, *supra*, makes clear that plaintiffs' cause of action was sustained on the basis of Title VI alone, without regard to the possibility that Section 1983 might provide an independent basis for Title VI enforcement. See 370 F.2d at 852.¹⁷ Further-

to permit federal courts to take jurisdiction under Section 1343(3) and then resolve pendent statutory claims to the effect that state welfare practices were inconsistent with federal law). No such problem arises under either Title VI or Title IX. These statutes plainly provide for "equal rights * * * of all persons within the jurisdiction of the United States" and for "the protection of civil rights." Federal jurisdiction is therefore conferred by 28 U.S.C. 1343(3) and 1343(4).

¹⁷ In its opinion on rehearing in the present case, the court of appeals stated, "As we read the case, *Bossier* relies on Title VI's prohibition of racial discrimination in federally funded educational programs merely to give plaintiffs the requisite *standing* to sue 'to enforce a national constitutional right' " (Pet. App. A-31 n.6). This is an incorrect interpretation of the Fifth Circuit's opinion. The black children in *Bossier Parish* lived on a federal enclave, a United States Air Force base. An initial question arose whether the children were members of the local school system with standing to challenge discrimination in that system. This issue was quite independent of the question whether Title VI creates a private cause of action. The Fifth Circuit held that the children were members of the school system because the school board had agreed to admit them in connection with its acceptance of federal funds. (The court further held that, even if the school board were under no legal obligation to admit the children, once they were in fact admitted, they had standing to assert their right to a desegregated education.) Only after the court resolved this standing question did it turn to the question

more, in a number of cases, courts have granted relief under Title VI where an action under Section 1983 would not lie. For example, a Section 1983 suit could not have been maintained against defendant in *Hawthorne v. Kenbridge Recreation Association, Inc.*, 341 F.Supp. 1382 (E.D. Va. 1972), because the recreation association was a private non-profit corporation not operating under color of state law. Nonetheless, the district court entered an order under Title VI directing the association to accept and evaluate membership applications without regard to race, color, or national origin.¹⁸

Most important, the court of appeals' reliance on Section 1983 as an explanation for previous private suits under Title VI is faulty because it contemplates a distinction inconsistent with Congress' purpose in enacting the latter statute. In the court of appeals' view, Title VI may be enforced through private suits whenever an allegedly discriminating recipient of

whether Title VI creates a private right of action (see 370 F.2d at 852). The passage from the *Bossier Parish* opinion cited by the court of appeals in this case has nothing to do with the latter question. As this Court recognized in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*, 414 U.S. 453, 456 (1974), the question whether one or another private party has standing to sue under a particular statute is logically distinct from the question whether that statute can support any private suits at all.

¹⁸ The court held that the association was covered by Title VI because it had received a recreational development loan from the Farmers' Home Administration, an agency of the federal government.

federal funds acts under color of state law. In such a situation, Section 1983 provides the necessary cause of action. Where the discriminating recipient of federal funds is a private institution, however, the court of appeals would preclude enforcement through private litigation. This distinction between public and private recipients of federal financial assistance ignores the fact that, in enacting Title VI, Congress sought to prohibit discrimination on the basis of race in *all* federally funded programs. Nothing in the legislative history of Title VI suggests that Congress envisioned different enforcement schemes depending on the public or private character of aid recipients. The court of appeals' effort to characterize all previous Title VI suits as actions brought under Section 1983 is unpersuasive. Title VI itself creates a private right of action, and that right has been recognized by numerous federal courts.

3. In his separate opinion in *Bakke, supra*, Mr. Justice White took the position that a private right of action is not implied under Title VI. Emphasizing that Title VI was intended to reach federally funded programs conducted by private institutions, even where government involvement in those programs is insufficient to justify their characterization as "state action," Mr. Justice White found it "difficult to believe that Congress *silently* created a *private* remedy to terminate conduct that previously had been entirely beyond the reach of federal law" (slip op. 5-6) (emphasis in original). But precisely the same statement could be made about a number of cases where

the Court *has* found a private right of action to be implied under federal legislation. See, *e.g.*, *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); and *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967), in all of which the conduct or events giving rise to the private suit would not have involved any violation of federal law before passage of the statutes that this Court decided could be enforced through private litigation.

Mr. Justice White further stated that implication of a private remedy under Title VI would be inconsistent with the legislative scheme of the Civil Rights Act of 1964. In support of this proposition, he cited the remedy provisions contained in other portions of the Act. Title II and Title VII, the public accommodations and employment titles, both reach private discriminatory conduct not previously proscribed by federal law. Both titles explicitly provide for enforcement through private suits. See 42 U.S.C. 2000a-3 and 42 U.S.C. (Supp. V) 2000e-5(f). In Mr. Justice White's view, the absence of such a provision in Title VI reflects a congressional decision not to permit private suits as a means of enforcing the guarantee against discrimination in federally funded programs. But the private rights of action provided in Title II and Title VII are limited both procedurally and remedially.¹⁹ A conclusion at least

¹⁹ For example, both Title II and Title VII express a preference for state or local resolution of complaints concerning discrimination in public accommodations or employment where

as plausible as Mr. Justice White's is that Congress wished to impose no such limits on private suits under Title VI.

the alleged act or practice in violation of the federal statute is also prohibited by state or local law. Title II provides that in such a situation no federal civil action may be brought until 30 days after written notice of the alleged act or practice has been given to the appropriate state or local authority. Title II further provides that in any civil action brought after the 30-day period has expired, the district court may stay proceedings "pending the termination of State or local enforcement proceedings." 42 U.S.C. 2000a-3(c). Title VII is even more deferential to state and local enforcement mechanisms. Where such mechanisms are available, Section 706(b) of the Civil Rights Act, 42 U.S.C. (Supp. V) 2000e-5(c), prevents the filing of any charge with the Equal Employment Opportunity Commission until at least 60 days after proceedings have been commenced under state or local law (unless such proceedings have been earlier terminated). A charge filed with the Commission is a prerequisite to a federal civil action, and no private action may be commenced until the Commission has dismissed the charge or has had at least 180 days to secure voluntary compliance or initiate a government suit. 42 U.S.C. (Supp. V) 2000e-5(f). (As originally passed, Title VII permitted private suits to be filed somewhat sooner—60 rather than 180 days after the filing of a charge still pending with the Commission. See 42 U.S.C. 2000e-5(e).)

In addition to favoring state, local and EEOC resolution of grievances, Congress limited the remedies available in private actions under Title II and Title VII. Title II authorizes only "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order * * *." See 42 U.S.C. 2000a-3(a). As initially enacted, Title VII allowed federal courts to enjoin unlawful employment practices and to "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay * * *." 42 U.S.C. 2000e-5(g). The statute was amended in 1972 to authorize the award of "any other equitable relief as the court deems appropriate." See 42 U.S.C. (Supp. V) 2000e-5(g).

This explanation derives support from the fact that Congress relied on different constitutional grants of legislative power in passing Title II and Title VII, on the one hand, and Title VI, on the other. Title II and Title VII represent broad exercises of the congressional power to regulate interstate commerce. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzbach v. McClung*, 379 U.S. 294 (1964). They reach enterprises and activities not connected directly or indirectly with the federal government. Before 1964 racial or ethnic discrimination by private employers or private operators of public accommodations was restricted by state law, if it was restricted at all. Under these circumstances, it is hardly surprising that Congress chose to defer to state and local enforcement procedures, where such procedures are available. Nor is it surprising that Congress decided to limit the remedies for Title II and Title VII violations to those most clearly related to eliminating the burden of discrimination on interstate commerce. By contrast, the legislative authority invoked by Title VI is the power to spend federal funds.²⁰ Congress can legitimately impose specific conditions on those who voluntarily receive federal financial assistance. See generally

²⁰ See 110 Cong. Rec. 2468 (1964) (Representative Celler) ("As a matter of simple justice, Federal funds, to which taxpayers regardless of race, color, or creed [*sic*] contribute, ought not be expended to support or foster discriminatory practices"); 110 Cong. Rec. 6544 (Senator Humphrey) ("The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination").

Steward Machine Co. v. Davis, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937). Where those conditions are violated by a recipient of public monies, there is no reason for Congress to defer to state or local law. The task of ensuring that federal funds are expended in accordance with the standards imposed by federal statute is uniquely federal. Similarly, there is no need to tailor potential relief to address interstate commerce concerns, because the statute in question is not grounded on the commerce power. In short, the fact that Title VI does not contain private action provisions like those found in Title II and Title VII does not mean that Congress wished to preclude private suits under Title VI; rather, Congress simply chose not to encumber Title VI actions with the same procedural and remedial restrictions applicable to suits under Title II and Title VII.²¹

²¹ Mr. Justice White also observed in his separate opinion in *Bakke*, *supra*, slip op. 2-3, that Titles III and Title IV of the Civil Rights Act of 1964, designed to eliminate discrimination in public facilities and public education, explicitly stated that they "would not adversely affect pre-existing private remedies." See 42 U.S.C. 2000b-2 and 2000c-8. These provisions referred to the private right of action conferred by 42 U.S.C. 1983 to redress deprivations of constitutional rights under color of state law. Of course, such a provision would have been inappropriate for inclusion in Title VI because, as Mr. Justice White also noted (slip op. 5-6), Title VI prevents discrimination on the basis of race, color, or national origin in *all* federally funded programs, not just those involving "state action."

4. Even if this Court ultimately should decide that Title VI of the Civil Rights Act did not create a private right of action, that would not be fatal to petitioner's position here. Whatever Congress may have thought when it enacted Title VI in 1964, by the time it passed the Education Amendments of 1972, several courts had already held that private suits could proceed under Title VI. See *Bossier Parish School Board v. Lemon*, *supra*; *Gautreaux v. Chicago Housing Authority*, 265 F.Supp. 582 (N.D. Ill. 1967);²² *Hawthorne v. Kenbridge Recreation Association, Inc.*, *supra*; *Blackshear Residents Organization v. Housing Authority of City of Austin*, 347 F.Supp. 1138 (W.D. Tex. 1972).²³ Thus, Title IX was enacted against a background of judicial approval of private litigation under the earlier statute.²⁴

²² In *Green Street Association v. Daley*, 373 F.2d 1, 8-9 (7th Cir.), cert. denied, 387 U.S. 932 (1967), the Seventh Circuit had an opportunity to repudiate the construction of Title VI in *Bossier Parish* and *Gautreaux*, but did not do so.

²³ See also *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967), cert. denied, 390 U.S. 921 (1968); *Alvarado v. El Paso Independent School District*, 445 F.2d 1011 (5th Cir. 1971); *Thomas v. Housing Authority of City of Little Rock*, 282 F.Supp. 575 (E.D. Ark. 1967); *McGhee v. Nashville Special School District*, 11 Race Rel. L. Rep. 698 (W.D. Ark. 1966), all relying on both the Constitution and Title VI.

²⁴ That Congress endorsed and sought to encourage such litigation is demonstrated by a provision contained elsewhere in the Education Amendments of 1972. Section 718 of the same statute that includes Title IX, now codified at 20 U.S.C. 1617, expressly provides attorney's fees for prevailing parties other than the United States in suits against local educational agen-

The fact that Congress, under these circumstances, modeled the language of Title IX after that used eight years earlier in Title VI is persuasive evidence that it expected private suits to be permitted under Title IX. This Court has recognized that intervening judicial and administrative interpretation of predecessor statutes may be highly relevant in construing future legislation patterned after the earlier laws. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-420 (1975); *Carolene Products Co. v. United States*, 323 U.S. 18, 25-26 (1944). That principle applies here, where it is unquestioned that Title IX was modeled on the legislative scheme employed in Title VI and where Congress in 1972 made no effort

cies, states, or the United States for discrimination on the basis of race, color, or national origin, in violation of Title VI of the Civil Rights Act of 1964 as it pertains to elementary and secondary education. See S. Conf. Rep. No. 92-798, 92d Cong., 2d Sess. 218 (1972). This provision evidently was intended to permit successful private plaintiffs in suits like *Bossier Parish* to recover reasonable attorney's fees.

Of course, the coverage of Section 718 has recently been expanded by the 1976 Civil Rights Attorney's Fees Awards Act, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988) (see pages 33-35, *infra*), which applies to all suits under Title VI, against private as well as public defendants, and to all suits under other federal civil rights statutes, including Title IX. The critical point here is not that Congress in 1972 decided to allow recovery of attorney's fees only in a limited number of suits under Title VI, but that Congress' decision to allow such recovery even in some suits reflected a recognition that private suits could be maintained under Title VI. This recognition was contemporaneous with the passage of Title IX which was intentionally patterned on Title VI.

to reject the precedents allowing private suits under the earlier statute.

This view of the congressional understanding in 1972 is supported not only by the language and history of additional antidiscrimination provisions enacted after Title IX (see pages 35-43, *infra*) but also by the 1976 Civil Rights Attorney's Fees Awards Act, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988). The Act authorizes courts to grant attorney's fees to the prevailing party in actions brought to enforce certain civil rights statutes, including both Title VI and Title IX.²⁵ Statements by several legislators during debate on the Act evidenced a widespread assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination. See, e.g., 122 Cong. Rec. S16251 (daily ed. September 21, 1976) (Senator Scott); *id.* at S16252 (Senator Kennedy); *id.* at S16262 (Senator Allen); 122 Cong. Rec. S16431 (daily ed. September 22, 1976) (Senator Hathaway); 122 Cong. Rec. S17051 (daily ed. September 29, 1976) (Senator Tunney); *id.* at S17052 (Senator Abourezk); 122 Cong. Rec. H12159 (daily ed. October 1, 1976) (Representative Drinan); *id.* at H12162-H12163 (Representative Kastenmeier); *id.* at H12164 (Representative Holtzman); *id.* at H12165 (Representative

²⁵ The Act states, in pertinent part:

In any action or proceeding to enforce * * * title IX of Public Law 92-318, * * * or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Seiberling). Senator Abourezk, the floor manager of the bill, specifically stated that *all* of the civil rights laws covered by the proposed Act "depend heavily upon private parties for enforcement" and that, by authorizing the award of attorney's fees to prevailing parties, the Act would "enlist[] private citizens as law enforcement officials." 122 Cong. Rec. S17052 (daily ed. September 29, 1976).

On rehearing in the present case, the court of appeals dismissed all these statements on the ground that they were not "explicitly declarative" of Congress' intent in passing Title IX, but rather involved "a mere assumption concerning a judicial construction that had been or might be placed on a statute after its enactment" (Pet. App. A-25). The court stressed instead (Pet. App. A-25 to A-27) a colloquy on the House floor during which Representative Railsback and Representative Drinan, supporters of the bill, assured two of their colleagues that the Attorney's Fees Awards Act would not create a new cause of action. The colloquy occurred after the bill had already passed the Senate. Representative Quie and Representative Bauman, apparently inspired by the court of appeals' initial decision in this case, expressed concern that the new Act might be read to authorize private suits under Title IX. See 122 Cong. Rec. H12152-H12153 (daily ed. October 1, 1976). Representative Railsback replied that the Act was intended not to create a new remedy but only to allow the recovery of attorney's fees "in the event that the

courts should in the future determine that an individual may sue" under Title IX. This exchange did not in any way detract from the validity of the views expressed by other legislators to the effect that private actions can be maintained under Title IX. Although the Attorney's Fees Awards Act did not authorize such actions, its legislative history reveals that many members of Congress believed that private suits had already been authorized by Title IX itself.

B. Title V of the Rehabilitation Act of 1973, a statute modeled on Title VI and Title IX, may be enforced through private litigation

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, provides:

No otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The statute thus prohibits discrimination against the handicapped in the same way that Title VI prohibits discrimination on the basis of race and Title IX prohibits discrimination on the basis of sex. Like Title VI and Title IX, Title V of the Rehabilitation Act says nothing explicit about its enforceability through private suits. Also like Title VI and Title IX, Title V contemplates enforcement through an administrative fund termination procedure. See Executive Order No. 11914, 41 Fed. Reg. 17871 (1976). Nonetheless, there is persuasive evidence that Congress intended to

create a private right of action under Title V, and that evidence corroborates the conclusion that Congress envisioned a similar method of enforcement for Title VI and Title IX.

One year after the Rehabilitation Act became law, Congress passed a number of technical and clarifying amendments (88 Stat. 1617) designed, *inter alia*, to eliminate any doubt that the antidiscrimination provision of Section 504 was intended to protect all handicapped persons, not only those in need of, or able to benefit from, vocational rehabilitation services. The language of Section 504 itself was not affected. In the committee reports accompanying the 1974 amendments, Congress plainly revealed its perception of Section 504 as a counterpart to Section 601 of the Civil Rights Act and Section 901 of the Education Amendments. Congress also indicated its belief that all three provisions could support private actions. The Senate Committee on Labor and Public Welfare stated:

Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 [*sic*; 20 U.S.C. 1681] (relating to sex). * * *

The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of

recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. * * * This approach to implementation of section 504, which closely follows the models of the above-cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974) (emphasis added). See also S. Rep. No. 93-1139, 93d Cong., 2d Sess. 24-25 (1974).²⁶

²⁶ Of course, Congress' statement in 1974 that a statute enacted two years earlier created a private right of action is not necessarily dispositive of the issue presented here. But the committee comments reproduced in the text are substantially more authoritative than most post-hoc indications of legislative intent. Not only did those comments appear shortly after passage of the Education Amendments of 1972, but they were issued by the very Senate committee that had considered the 1972 Amendments, including Title IX. The 1974 committee report accompanying the Rehabilitation Act amendments is thus a particularly persuasive piece of legislative history. This Court has recognized that subsequent legislative statements may be helpful in the interpretation of earlier statutes. See *Glidden v. Zdanok*, 370 U.S. 530, 541-542 (1962) (plurality opinion); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958) ("Subsequent legislation which declares the intent of an earlier law is not, of course, conclusive in deter-

Last Term, this Court reviewed a decision in which a three-judge federal district court resolved a private suit on constitutional grounds and did not rule on appellees' claim under Section 504. The Court vacated the judgment below and remanded "with directions to decide the claim based on the federal statute, § 504 of the Rehabilitation Act of 1973 * * *." *Campbell v. Kruse*, 434 U.S. 808 (1977). This disposition implicitly recognized that a private action can be maintained under Title V. Several lower federal courts, including the Seventh Circuit, have explicitly reached the same conclusion. See *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *Vanko v. Finley*, 440 F. Supp. 656 (N.D. Ohio 1977). The court of appeals decided *Lloyd* while the present case was pending on rehearing. The Seventh Circuit panel in this case then distinguished *Lloyd* on the ground that the Rehabilitation Act decision turned on the lack of an effective administrative remedy to vindicate the rights guaranteed by Section 504 (Pet. App. A-32). By contrast, in the panel's view, the procedure established by Section 902 of the Education Amendments and HEW's implementing regulations does constitute an adequate administrative enforcement scheme for the rights guaranteed by Title IX and therefore no private right of action need be implied under the 1972 law.

mining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction").

While the Seventh Circuit's decision in *Lloyd* may have rested in part on HEW's delay in issuing effective regulations under the Rehabilitation Act (see 548 F.2d at 1285-1287), the panel's emphasis on this aspect of the decision creates an artificial distinction between Title IX and Title V. From the outset Congress expected that Section 504 enforcement would involve administrative action similar or identical to that provided under Title IX. Indeed, when HEW had not issued implementing regulations within a year after passage of the Rehabilitation Act, Congress expressly directed that such regulations be issued promptly and that they follow the models applicable under Title VI and Title IX. See S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-41 (1974). The reference in the very same committee report to "a judicial remedy through a private action" was not dependent on an assumption that the regulations would be further delayed and did not in any way suggest that private actions should be permitted only until the regulations became effective. The long-awaited regulations have now been promulgated (see 45 C.F.R. Part 84; and 43 Fed. Reg. 2136 (1978) (to be codified at 45 C.F.R. Part 85)), and, like the regulations issued under Title IX, they incorporate the enforcement procedures first adopted under Title VI of the Civil Rights Act. See 45 C.F.R. 84.61 and 86.71 (both incorporating 45 C.F.R. 80.6-80.10 and Part 81). Issuance of most of the Title V regulations preceded this Court's decision in *Campbell v. Kruse*,

supra, and the Second Circuit's decision in *Leary v. Crapsey, supra*. Yet neither court saw fit to depart from the result reached in *Lloyd* simply because the anticipated administrative enforcement scheme had taken effect.

C. The express provision for an exclusive administrative remedy in Title III of the Older Americans Amendments of 1975 indicates that Congress did not wish to preclude private suits under Title IX, a statute that contains no such provision

Title III of the Older Americans Amendments of 1975, 42 U.S.C. (Supp. V) 6101 *et seq.*, represents a compromise between the House and Senate. The House passed a bill prohibiting age discrimination in federally funded programs. The bill bore a strong resemblance to Titles VI and IX, except that it specifically excluded cases where age is a factor necessary to the normal operation of a particular federally assisted program or activity. H.R. 3922, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 94-67, 94th Cong., 1st Sess. 15-16, 32 (1975); H.R. Conf. Rep. No. 94-670, 94th Cong., 1st Sess. 52-53, 56 (1975). The Senate, on the other hand, thought further study necessary before adoption of a legislative prohibition on age discrimination in federal programs. Accordingly, the Senate bill provided only for a thorough study of the subject by the Commission on Civil Rights. S. 1425, 94th Cong., 1st Sess. (1975); S. Rep. No. 94-255, 94th Cong., 1st Sess. 31-32, 49 (1975); H.R. Conf. Rep. No. 94-670, *supra*, at 54. The conference committee compromise retained the House's

general prohibition against age discrimination,²⁷ but provided that the prohibition should operate only pursuant to regulations issued by the Secretary of HEW and the heads of other federal departments and agencies. The regulations in turn are to be issued only after completion of a study by the Commission on Civil Rights along the lines originally proposed by the Senate. See 42 U.S.C. (Supp. V) 6102, 6103, 6106; H.R. Conf. Rep. No. 94-670, *supra*, at 57. No regulations are to become effective before January 1, 1979.

As part of the compromise, Section 305(e) of the Older Americans Amendments, 42 U.S.C. (Supp. V) 6104(e), provided that administrative measures for achieving compliance with the regulations thus issued shall be "the exclusive remedy for the enforcement" of Title III.²⁸ Congress thus demonstrated that it was

²⁷ Section 303 of the Older Americans Amendments, 42 U.S.C. (Supp. V) 6102, provides in pertinent part:

* * * [N]o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

²⁸ Section 305(a), 42 U.S.C. (Supp. V) 6104(a), provides:

The head of any Federal department or agency who prescribes regulations under section 6103 of this title may seek to achieve compliance with any such regulation—

(1) by terminating, or refusing to grant or to continue, assistance under the program or activity involved to any recipient with respect to whom there has been an express finding on the record,

capable of making its wishes explicit when it wanted to prohibit a certain kind of discrimination in federally funded programs but at the same time to restrict the procedures available for enforcing that prohibition. The conference committee report is instructive. The committee stated:

Neither the private right to seek a remedy through civil suit contemplated by the House bill nor the authority of the Attorney General to bring "pattern and practice" actions contained therein is included in the conference substitute; thus, implementation will proceed through a set of consistent Federal regulations rather than on a case by case method in the courts.

after reasonable notice and opportunity for hearing, of a failure to comply with any such regulation; or

(2) by any other means authorized by law.

Section 305(a)(2)'s reference to "any other means authorized by law" apparently contemplated injunctive suits brought by the Attorney General at the instance of federal grant agencies that have detected violations of their regulations. Such proceedings against offending recipients of federal funds could serve as an alternative to fund termination, even though Congress did not authorize the Attorney General to sue on his own initiative. Cf. 45 C.F.R. 80.8(a)(1) (interpreting the phrase "other means authorized by law" as used in Title VI to comprehend enforcement through referrals to the Department of Justice "with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States"). 45 C.F.R. 80.8 has been incorporated by reference in the regulations issued by HEW under Title IX and under Title V of the Rehabilitation Act (see page 39, *supra*).

H.R. Conf. Rep. No. 94-670, *supra*, at 57. But the House bill said nothing about private suits. If the bill "contemplated" a private right of action, it did so only through its use of language identical to that used in Title VI of the Civil Rights Act, Title IX of the Education Amendments, and Title V of the Rehabilitation Act. See H.R. 3922, *supra*; H.R. Rep. No. 94-67, *supra*, at 32. The conference committee report thus reflects the congressional understanding that statutes using the "no person" formula (*i.e.*, "no person * * * shall, on the basis of _____, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under * * *") ordinarily do create a private right of action.

III

APPLICATION OF THE FOUR-PART TEST ANNOUNCED BY THIS COURT IN *CORT v. ASH* SUPPORTS IMPLICATION OF A PRIVATE RIGHT OF ACTION UNDER TITLE IX

This Court has frequently found it necessary to decide whether particular statutes, though silent on the subject of private remedies, should nevertheless be construed to authorize enforcement through private suits. See, *e.g.*, *Allen v. State Board of Elections*, *supra*; *J. I. Case Co. v. Borak*, *supra*; *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944); *Texas & Pacific Railway Co. v. Rigsby*, *supra*. By hypothesis in such situations, the legislature has not addressed the question whether a private right of action should be recognized. Where the legislature

has spoken, of course, its command governs, and no issue of implication arises. But where Congress has not made its wishes clear, the courts have been faced with the difficult task of deciding whether enforcement through private litigation is consistent with the "dominating general purpose" of the statute involved. See *SEC v. C.M. Joiner Corp.*, 320 U.S. 344, 350-351 (1943).

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), this Court reviewed its earlier decisions concerning implication of a private right of action and enumerated several factors that are pertinent "[i]n determining whether a private remedy is implicit in a statute not expressly providing one * * *." The unanimous Court asked the following four questions (*ibid.*):

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," * * * —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Assertedly applying the test announced in *Cort*, and relying as well on two other recent decisions by this Court, *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975), and *National Railroad*

Passenger Corp. v. National Association of Railroad Passengers (Amtrak), 414 U.S. 453 (1974), the court of appeals here concluded that no private right of action is implied under Title IX. Its decision has been criticized on the ground that it fails to take adequate account of this Court's "consistently favorable attitude toward permitting [private] suits under [civil rights] statutes." See Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 Yale L. J. 1378, 1388 (1978). See also Karst, *Federal Remedies*, 54 U. Det. J. Urb. L. 1025, 1030 (1977); Shelton & Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 Calif. L. Rev. 1121, 1149-1159 (1974). While this criticism appears justified (neither court of appeals' opinion so much as mentions *Allen*, for example), one need not fully accept its assessment of past implication decisions in order to conclude that the court of appeals erred in this case. Even if earlier cases do not suggest that this Court has been more willing to find implied private rights of action in the civil rights context than elsewhere, straightforward application of the criteria announced in *Cort*²⁰ sufficiently demonstrates that the judgment below should be reversed.

Petitioner is plainly a member of the class of persons for whose especial benefit Title IX was enacted.

²⁰ Respondent stockholder in *Cort* sought to base an implied private right of action on a criminal statute prohibiting certain corporate political contributions. No civil rights issues were involved.

As Senator Bayh explained, the statute was designed "to provide women with solid legal protection as they seek education and training for later careers * * *." 118 Cong. Rec. 5806-5807 (1972). In proposing the amendment that became Title IX, Senator Bayh presented detailed documentation of the "massive, persistent patterns of discrimination against women in the academic world" (*id.* at 5804). See also *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcommittee on Education of the House Committee on Education and Labor*, 91st Cong., 2d Sess. (1970). When Congress prohibited discrimination on the basis of sex in federally funded education programs, it was addressing itself to precisely the kind of discrimination petitioner allegedly suffered in this case.

Moreover, as this Court's decision in *Allen* demonstrates, Congress' choice of language reveals an intention to protect all persons from discrimination on the basis of sex. Congress could have provided that "no educational program discriminating on the basis of sex shall receive federal financial assistance." But Congress did not use such language. Rather, it provided that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." This language in Section 901 of the Education Amendments, like the nearly identical language in Section

601 of the Civil Rights Act, creates personal rights.³⁰ See Supplemental Brief for the United States as Amicus Curiae in *Bakke* at 28-29. Congress was not concerned simply with the proper allocation of federal funds; it was seeking to end discrimination on the basis of sex. Similarly, when Congress used the "no person" formula in the Voting Rights Act of 1965, it was seeking to end discrimination on the basis of race or color. *Allen* held that any person denied the right to vote in violation of Section 5 of the Voting Rights Act may sue to enforce the guarantee provided by that statute; likewise, any person excluded

³⁰ Title VI of the Civil Rights Act of 1964 was Congress' response to the problem of discrimination against blacks in programs receiving federal aid. This point was not questioned by any of the opinions in *Bakke*. See Powell, J., slip op. 15-17; Brennan, White, Marshall, and Blackmun, JJ., slip op. 5-12; Stevens, J., slip op. 6. Yet despite the conceded legislative focus on discrimination against blacks, no Justice suggested that respondent in *Bakke*, a white man, might not be a member of the class for whose special benefit Title VI was enacted. Not even Mr. Justice White, who believed for other reasons that a private right of action is not implied under Title VI, suggested that respondent was not a member of the group that the statute sought to protect. The simple explanation for this is supplied by the language of Section 601. In providing that "no person" may be excluded from participation in federally funded programs on the basis of race, color, or national origin, Title VI creates a personal right for all persons, black and white, not to be subject to such discrimination. Cf. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981 prohibit discrimination against whites as well as blacks). Similarly, Title IX creates a personal right for all persons, men as well as women, not to be subject to discrimination on the basis of sex in federally funded education programs.

from participation in a federally funded education program on the basis of sex should be permitted to sue to enforce Congress' express prohibition of such practices.

Turning to the second relevant factor listed in *Cort*, the contemporaneous legislative history of Title IX does not contain any definitive indication of Congress' intent to create or deny a private remedy.³¹ Indeed, if clear evidence of this kind were available, it would be dispositive, and courts would not need to decide whether a private right of action is implied. See *Cort v. Ash, supra*, 422 U.S. at 82. For this reason, one commentator has observed that "the process of deciding whether to imply a cause of action is more likely to be hindered than helped when placed in the narrow context of a search for tokens of legislative intent." Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 291 (1963).³² For this reason also, the court of appeals' reliance on this Court's decision in *Amtrak, supra*, is misplaced. The legislative history of the Amtrak Act revealed that the relevant congressional committee was aware that the Act permitted private suits

³¹ Evidence of legislative intent drawn from the language, legislative history, and judicial interpretations of other statutes enacted before and after Title IX is discussed in point II of this brief (pages 18-43, *supra*).

³² See also Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538-540 (1947) (criticizing the notion of "legislative intent" to the extent it connotes a phenomenon distinct from the statute itself and the congressional purpose underlying its enactment).

only in certain limited circumstances and deliberately rejected a proposal that would have expanded the availability of a private right of action. 414 U.S. at 458-461. This background strongly supported the Court's conclusion that only those private suits explicitly authorized by the statute should be allowed to proceed. See also *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471-472, 477 & n.18 (1959). No such convincing evidence of legislative intent, narrowly construed, is present in this case.

Cort v. Ash, supra, 422 U.S. at 82, stated that "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." Unlike the criminal statute at issue in *Cort*, Title IX was intended to confer personal rights, in particular, the right to be free from discrimination on the basis of sex in federally funded education programs (see pages 45-47, *supra*). Accordingly, under *Cort*, petitioner need not demonstrate any specific congressional intention to create a private cause of action. Given the lack of any direct evidence that Congress intended to deny such a cause of action, the question becomes whether enforcement through private suits is "consistent with the underlying purposes" of Title IX. That question should be answered in the affirmative.

Administrative enforcement of Title IX is an enormous task. We are informed by HEW that Title IX applies to federally funded education programs at

approximately 97,000 institutions. The number of participants in these programs, and hence the number of beneficiaries of federal funding, is approximately 55 million. The administrative enforcement scheme established in Section 902 of the Education Amendments of 1972, 20 U.S.C. 1682, requires federal agencies extending financial assistance to education programs to attempt to secure voluntary compliance with Title IX and the regulations issued thereunder before taking more drastic enforcement action, such as termination of funding or referral to the Attorney General for a possible injunctive suit. Section 902 further provides that termination or refusal of financial assistance may occur only after the recipient or prospective recipient of funds has been afforded an opportunity for a hearing on the alleged noncompliance with Title IX, and only after the funding agency has submitted to the relevant congressional committees a full report concerning the circumstances and grounds for the proposed termination or refusal of aid and 30 days have elapsed after submission of the report. Effective operation of this administrative process demands a heavy commitment of federal resources, and, even with such a commitment, individual instances of illegal discrimination on the basis of sex are likely to remain without redress.

Moreover, even if funding agencies realistically could expect to detect all Title IX violations and to initiate enforcement activities in response to each one, the administrative remedies provided in Section 902

are not designed to ameliorate the harmful effects suffered by the victims of discrimination. Termination of funding to institutions found to have discriminated in violation of Title IX will hardly help those who have been denied admission to professional schools on the basis of sex, as petitioner alleges she has. A private right of action is necessary to provide adequate relief to the very persons who have suffered the discrimination that Congress sought to prohibit. If the only remedy available for a violation of Title IX were the termination of future federal financial support, Congress' command that no person shall be discriminated against on the basis of sex in federally funded education programs would be an "empty promise" for those who have actually been subjected to such discrimination. Cf. *Allen v. State Board of Elections*, *supra*, 393 U.S. at 557.

Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975), does not support the court of appeals' refusal to uphold a private right of action under Title IX. That case held that customers of a financially strapped broker-dealer may not sue to compel the SIPC to intervene on behalf of investors by filing an application to liquidate the broker-dealer's business, thus activating the protections provided by the Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa *et seq.* The Court ruled that private suits of this nature would be "inimical to the purposes of the Act" (421 U.S. at 423). The Court first observed that the SIPC tries to defer intervention as

long as possible in the hope that the broker-dealer will be able either to avoid financial collapse altogether or to liquidate under the supervision of an industry self-regulatory organization or a district court, without danger of loss to customers (*id.* at 421-422). The Court then explained that, in contrast to the Securities and Exchange Commission and the SIPC, a private customer "cannot be expected to consider, or have adequate information to consider, these public interests in timing his decision to apply to the courts" (*id.* at 422). Because the mere filing of a private action based on allegations of financial insecurity might well prove fatal to a broker-dealer's business, the Court concluded that judicial recognition of such suits would be inconsistent with the congressional scheme underlying the creation of the SIPC, a non-profit corporation intended not only to protect customers of failing broker-dealers, but also to "restore investor confidence in the capital markets" by taking steps to improve broker-dealers' financial responsibility (*id.* at 415).

No similar rationale counsels against implication of a private right of action in this case. Enforcement of Title IX through private litigation poses no threat to the stability of federally funded education programs or to the efficacy of administrative enforcement measures. Mr. Justice White, in his separate opinion in *Bakke, supra*, took the position that the administrative enforcement procedures established by Title VI of the Civil Rights Act (see 42 U.S.C. 2000d-1) preclude implication of a private right of

action under that statute, because, if private suits were permitted, persons alleging injury from illegal discrimination would be able to circumvent the procedural requirements that must be satisfied before federal funding may be terminated under Title VI (slip op. 3-5). The administrative enforcement provision in Title IX is nearly identical to the corresponding provision in Title VI (compare 20 U.S.C. 1682 with 42 U.S.C. 2000d-1). Private suits under Title IX are thus subject to the same objection raised by Mr. Justice White to private suits under Title VI. That objection, however, is not persuasive for several reasons.

First, the relief requested in private suits against recipients of federal funds under either Title VI or Title IX will rarely, if ever, include fund termination.³³ The simple explanation for this is that a

³³ A private plaintiff may, of course, sue a funding agency in an effort to compel the agency to commence administrative enforcement proceedings against an allegedly discriminating recipient of federal aid. In such cases the agency's failure or refusal to act on its own may be reviewed under the standards provided in the Administrative Procedure Act. Cf. *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). A successful plaintiff in this kind of suit may set in motion the administrative process that ultimately can result in the termination of an offending recipient's funds. Even so, however, the plaintiff's personal goal almost always will be individual relief obtained as a byproduct of the agency's mandatory efforts to secure voluntary compliance. If those efforts prove futile, it will little benefit the private plaintiff that the agency eventually decides to impose the sanction of fund termination.

In the present case petitioner joined the federal respondents in her amended complaints and sought "an injunction pro-

private plaintiff is unlikely to derive any benefit from fund termination. Petitioner in this case and respondent in *Bakke* filed suit because they wished to be admitted to medical school, not because they wished to block future federal financial support to the institutions that denied them admission. See *Bakke*, *supra*, slip op. 12 n.26 (opinion of Stevens, J.). Mr. Justice White has suggested that this is a distinction without a difference because, if private suits to enjoin conduct allegedly violative of Title VI or Title IX were permitted,

hibiting the Secretary and the Regional Director from continuing to fail to investigate promptly and take appropriate related administrative and enforcement actions, including conciliation and efforts to effect voluntarily compliance * * *." The district court sua sponte dismissed this aspect of petitioner's complaints and the court of appeals likewise refused to entertain petitioner's claim under the APA (Pet. App. A-20). In her brief in this Court (Br. 20), petitioner asserts that "denial of the administrative relief sought against HEW was incorrect." The correctness *vel non* of the court of appeals' ruling on petitioner's APA claim is an issue not fairly comprised within the question presented for review in this Court. Under this Court's Rule 40(1)(d)(2), briefs on the merits may not raise questions additional to those presented in the petition for a writ of certiorari. Accordingly, this Court should not now review petitioner's challenge to the dismissal of her complaints against the federal respondents. If petitioner does not prevail in her contention that Title IX creates a private right of action, the federal respondents will, of course, fulfill their responsibility under applicable regulations to conduct an administrative investigation of petitioner's charges against the University of Chicago and Northwestern University.

recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of [the relevant statute] or refusing federal funds and thereby escaping from the statute's jurisdictional predicate. This is precisely the same choice which would confront recipients if suit was brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law.

Bakke, *supra*, slip op. 8 (opinion of White, J.) (footnote omitted). This analysis ignores the personal relief that may be awarded in a private suit under Title VI or Title IX, without regard for whether the recipient of federal funds chooses to accept or reject such funds in the future. In this case, for example, if petitioner proves the sex discrimination she has alleged, the district court may order her admission to medical school, even if the University of Chicago and Northwestern University never accept another penny of federal aid.³⁴

³⁴ Consider also the recipient that obtains a federal grant to finance the building of a particular educational facility, but decides not to seek additional federal funds in ensuing years. Such a recipient is bound not to discriminate on the basis of race or sex as long as the federally financed facility is in use for the purpose for which it was funded. See 45 C.F.R. 86.4(b)(1); 45 C.F.R. 80.4(a)(1). If at some point during the facility's lifetime, the recipient nevertheless discriminates in violation of Title VI or Title IX, funding termination could not serve as a meaningful sanction because by hypothesis the recipient would no longer be receiving funds that could be terminated. In this situation, an injunctive

An additional problem with the view that private litigation is incompatible with the administrative remedy provided in Title VI and Title IX is that it disregards earlier decisions in which this Court and others have recognized a private cause of action to enforce certain statutory rights, even though the statute at issue explicitly contemplates administrative enforcement. For example, in *Rosado v. Wyman*, 397 U.S. 397 (1970), petitioner contended that a provision in New York's Social Services Law was incompatible with a section of the federal Social Security Amendments of 1967, dealing with the Aid to Families with Dependent Children (AFDC) program. The Social Security Act establishes a detailed procedure under which the Secretary of Health, Education, and Welfare reviews state AFDC plans and approves the distribution of federal funds to states whose plans meet federal requirements (*id.* at 406 n.8; see 42 U.S.C. (and Supp. V) 601 *et seq.*). The statute also provides a method whereby the Secretary may cut off funds if he determines, after notice and an opportunity for a hearing, that a subsequent change in a state plan does not comply with federal law (*ibid.*; see 42 U.S.C. (and Supp. V) 604). Notwithstanding the existence of this administrative procedure designed to ensure state adherence to federal AFDC requirements, and despite Congress' failure

suit, either by the government or by the individual victims of discrimination, would be the only means by which compliance could be enforced. See 45 C.F.R. 80.8(a) (1). See also note 28, *supra*.

specifically to authorize private actions, this Court held that petitioner could maintain a private suit alleging that a change in New York's method of computing AFDC benefits departed from federal standards (397 U.S. at 405-407).

Other decisions also have endorsed a private right of action as a complement to an administrative enforcement scheme. See, e.g., *J. I. Case Co. v. Borak*, *supra* (private right of action to enforce SEC proxy rules); *Fitzgerald v. Pan American World Airways*, 229 F.2d 499, 501-502 (2d Cir. 1956) (implied private right of action to enforce statute prohibiting discrimination in air transportation, even though statute specifically provided administrative complaint procedure under which Civil Aeronautics Board could issue order compelling future compliance). Indeed, where an allegedly discriminating recipient of federal funds operates under color of state law, several federal courts, including the court of appeals in this case (Pet. App. A-33 to A-34), have approved private litigation as a means of enforcing Title IX. See *De La Cruz v. Tormey*, No. 76-2791 (9th Cir. Sept. 13, 1978), slip op. 3026-3028; *Alexander v. Yale University*, Civ. No. N-77-277 (D. Conn. Dec. 21, 1977), slip op. 8-9. In such a situation, 42 U.S.C. 1983 provides the necessary cause of action even if one assumes *arguendo* that Title IX itself does not (see pages 22-24 and note 16, *supra*).³⁵

³⁵ Respondent's complaint in *Bakke*, *supra*, did not mention Section 1983 and, accordingly, the opinions in the case did not discuss the role of that statute in the enforcement of

The cases cited in the preceding paragraphs demonstrate that, even where Congress has provided administrative machinery to implement a particular statute and to monitor and compel compliance therewith, courts need not refuse to entertain private suits as an additional enforcement device. Such a refusal is appropriate where implication of a private right of action would be likely to produce results contrary to the legislature's aim (see *SIPC v. Barbour, supra*) or where the primary purpose to be served by private litigation would be one not contemplated by Congress (see *Cort v. Ash, supra*; *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 35, 39-40 (1977)). But where private suits will directly advance the central purpose Congress sought to achieve, they should be permitted unless the legislature has indicated otherwise.³⁶

Title VI and other federal laws. The complaint also did not mention 42 U.S.C. 1981, which prohibits any educational institution, public or private, from denying admission to prospective students on the basis of race and which is enforceable by private suit. *Runyon v. McCrary*, 427 U.S. 160 (1976).

³⁶ Private suits under Title IX would raise no difficulties concerning exhaustion of administrative remedies. As Professor Davis has explained, the requirement of exhaustion ordinarily arises only in the context of review of agency action. 3 K. Davis, *Administrative Law Treatise* § 20.01, at 57 (1958). See *McKart v. United States*, 395 U.S. 185, 193-195 (1969). Here, petitioner is challenging not an action or determination of a federal department or agency, but rather sex discrimination allegedly practiced by two private universities that receive federal funds. At least two district courts have held that prospective plaintiffs under Title VI of the Civil Rights Act of 1964 must avail themselves of the administrative complaint procedure established by HEW's regulations (see 45 C.F.R.

Turning finally to the fourth question posed in *Cort v. Ash, supra*, regarding the propriety of an im-

80.7(b), (c), incorporated by reference in 45 C.F.R. 86.71, the corresponding regulation under Title IX), before they may seek judicial relief. See *Feliciano v. Romney*, 363 F. Supp. 656, 672-673 (S.D. N.Y. 1973); *North Philadelphia Community Board v. Temple University*, 330 F. Supp. 1107, 1110-1111 (E.D. Pa. 1971). These decisions misapprehend the nature of administrative enforcement under Title VI (and, by implication, Title IX as well). The fund termination procedure provided in Title VI and Title IX is not designed primarily to redress individual grievances of persons who have been subjected to illegal discrimination in federally funded programs. While it is true that such persons may trigger an administrative investigation by filing a complaint with the appropriate funding agency, they may not participate as parties in the investigation or in subsequent enforcement proceedings. A voluntary compliance agreement between the agency and the recipient of funds need not include relief for the specific benefit of the original complainant. In short, an exhaustion requirement is inappropriate under Title VI and Title IX, because petitioner and other persons similarly situated do not have any administrative remedies to exhaust.

Nor would private suits under Title IX raise any primary jurisdiction problem. This Court has explained that the doctrine of primary jurisdiction

applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pacific Railroad Co., 352 U.S. 59, 64 (1956). See also *United States v. Philadelphia National Bank*, 374 U.S. 321, 353 (1963); *Best v. Humboldt Mining Co.*, 371 U.S. 334, 338 (1963); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 302, 305-306 (1973). Similarly, Professor Davis has said that "the doctrine of primary jurisdiction de-

plied private right of action, enforcement of Title IX is surely not a matter "traditionally relegated to state

termines whether the court or the agency should make the initial decision." 3 K. Davis, *Administrative Law Treatise* ¶ 19.01, at 2 (1958) (footnote omitted). In private suits under Title IX, there is no reason for courts to stay their hand in deference to the special competence of an administrative agency. Title IX's prohibition against sex discrimination in federally funded education programs does not involve a complex or technical statutory scheme, the enforcement of which requires unusual training or expertise. Courts are highly experienced in adjudicating discrimination complaints and they are well suited to the task. Because of the large number of schools and educational programs covered by Title IX, the administrative response to individual complaints frequently entails considerable delay. Under these circumstances, courts generally need not await a funding agency's views before proceeding to resolve private disputes under Title IX.

This case does not require the Court to determine the proper relationship between administrative and judicial proceedings in every conceivable set of circumstances that may arise under Title IX. In particular, the Court need not address itself to the various questions presented when an administrative investigation is under way or has already been completed at the time a Title IX complaint is filed in district court. The Court need not decide, for example, what weight should be accorded in a judicial proceeding to an earlier administrative finding that a given recipient of federal funds is operating its education programs in compliance with Title IX and applicable regulations. Similarly, the Court need not reach the question whether it might be appropriate in some situations for a district court to defer action on a private Title IX complaint pending completion of an ongoing administrative investigation or pending the outcome of informal negotiations directed toward achieving voluntary compliance with Title IX. These questions and other like them should not be resolved prospectively in a case where they are not presented; they are best left for future consideration as they arise in actual cases. Cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 154-155 (1967).

law, in an area basically the concern of the States" (422 U.S. at 78). The power exercised in Title IX is a uniquely federal power—the power to control the expenditure of federal funds and to impose conditions on the way those funds may be used by those who receive them. The right conferred by Title IX is a federal right—the right to be free from discrimination in federally funded education programs. Accordingly, federal courts, when called upon to vindicate rights guaranteed by Title IX, have no occasion to defer to state law. Title IX should be enforced according to a uniform federal standard and should not depend on the vagaries of state provisions concerning discrimination on the basis of sex. The fourth criterion listed in *Cort* therefore offers strong support for implication of a private right of action under Title IX.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings under Title IX.

Respectfully submitted.

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NOVEMBER 1978

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**JOINT BRIEF OF RESPONDENTS THE UNIVERSITY OF
CHICAGO AND NORTHWESTERN UNIVERSITY.**

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

**JOINT BRIEF OF RESPONDENTS THE UNIVERSITY OF
CHICAGO AND NORTHWESTERN UNIVERSITY.**

This brief is submitted on behalf of all respondents other than
the federal respondents.

STATUTES INVOLVED.

Petitioner's brief includes only the first section of Title IX of the Education Amendments of 1972, omitting those sections relating to administrative enforcement and judicial review. The relevant portions of sections 901-903 of the Act (20 U. S. C. §§ 1681-83) are set out in the Appendix to this brief. The comparable provisions of Title VI of the Civil Rights Act of 1964, sections 601-603 (42 U. S. C. §§ 2000d-2000d-2), are also included in the Appendix.

QUESTION PRESENTED.

Title IX of the Education Amendments of 1972 (86 Stat. 373-75; 20 U. S. C. § 1681 *et seq.*) declares that no person shall be subject to discrimination on the basis of sex in any federally assisted education program. Effectuation and enforcement of Title IX is delegated to the Department of Health, Education and Welfare; agency action is subject to judicial review. No independent private right of action is provided. Was the court below correct in concluding that no independent private right of action could be inferred and that federal administrative enforcement followed by judicial review is the exclusive remedy?

STATEMENT OF THE CASE.

Petitioner Geraldine Cannon, a woman over 30 years of age, applied for admission to the 1975 class at both The University of Chicago Pritzker School of Medicine and Northwestern University Medical School, the medical schools of the respondent universities. After applications were rejected by both schools, she filed administrative complaints with the Department of Health, Education and Welfare in April, 1975 (App. 16), alleging that each respondent medical school had discriminated against her on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*

The theory of her administrative complaint was that the schools had a policy of discouraging applicants over 30 years of age and that this policy had a "disproportionately adverse effect upon women." Pet. Br. 3.

Within a few months of filing her administrative complaints and while investigations were pending, she initiated this action, filing substantially identical complaints against each respondent school¹, alleging the same Title IX violation charged in the administrative complaints before HEW. She also alleged violation of her Fourteenth Amendment rights under 42 U. S. C. § 1983; § 799A of the Public Health Services Act, 42 U. S. C. § 295h-9; and the Age Discrimination in Employment Act, 29 U. S. C. §§ 621 *et seq.*

After the trial court dismissed the original complaints, petitioner filed amended complaints substantially identical to the original, but adding as additional parties the Secretary of HEW and the Regional Director of the Office for Civil Rights of HEW. App. 3.

The amended complaints sought, *inter alia*, injunctions against the respondent schools requiring her admission. Alternate relief against HEW under the Administrative Procedure Act, 5 U. S. C. § 706, was requested: an injunction prohibiting HEW from failing to investigate promptly and take appropriate actions "including conciliation and efforts to obtain voluntary compliance with respect to plaintiff's administrative complaint." App. 19.

Motions to dismiss the amended complaints on jurisdictional grounds were filed by the schools. App. 39, 43. HEW answered in its own name, stating, *inter alia*:

"The defendant [HEW] further asserts that the Civil Rights Act of 1964 . . . as amended by Title IX of the 1972 Education Amendment does not give jurisdiction to this court of the subject matter. Under Title IX as well as Title VI, judicial review of the Department's action is pro-

1. The separate suits against each of the respondent schools were consolidated in the Court of Appeals.

vided for after a final decision has been made on a complaint filed with the Office of Civil Rights." App. 44-5.

The trial court dismissed the amended complaints on jurisdictional grounds, holding with respect to Title IX that while the Title "provides for judicial review of agency action, it does not authorize a private right of action against the University." 406 F. Supp. 1257, 1259.

The Court of Appeals affirmed. It found insufficient "state action" to support the Fourteenth Amendment allegations under § 1983; the Age Discrimination in Employment Act inapplicable since petitioner was seeking admission as a student, not as one seeking employment through respondent schools; and no jurisdiction under Title IX or the Public Health Services Act. With respect to the alternate claim under the Administrative Procedure Act, 5 U. S. C. § 706, for relief against HEW, the Court observed that "HEW is actively investigating plaintiff's complaint and the delay involved of about one year has not been unreasonable." 559 F. 2d 1063, 1077; Cert. Pet. A-20.

With respect to Title IX, the Court concluded: "It is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act." 559 F. 2d at 1073; Cert. Pet. A-14.

Shortly after the Court of Appeals' initial opinion was promulgated in August 1976, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, was enacted. A petition for rehearing was filed by petitioner relying in part upon the new Act in support of her contention that a private right of action was in fact intended under Title IX. The Court of Appeals then granted rehearing solely on the Title IX issue. 559 F. 2d at 1077; Cert. Pet. A-23.

Consistent with its answer to the amended complaints, HEW had argued until this point that there was no independent private right of action. In its brief to the Court of Appeals it con-

tended that "plaintiff's remedy for alleged sex discrimination is limited to Title VI's administrative procedure as incorporated by reference into Title IX's statutory provisions," and that Title IX "precludes direct action by the individual." HEW Br. Ct. App. 8, 13. HEW filed an answer opposing the petition for rehearing for the reason that the petition "raises no issues justifying reconsideration."

Then, without explanation, HEW withdrew its answer opposing the rehearing petition and filed a substitute answer in which it completely reversed its position, claiming now that "the administrative procedure . . . is not the exclusive mechanism for enforcing Title IX, and the legal rights established by [section 901] can be effectively enforced by individuals bringing private causes of action." Since then HEW has opposed our position with as much vigor as it previously supported us.²

Upon full consideration of the Attorney's Fees Award Act and the new arguments raised by HEW in support of a private right of action, and after re-examination of its initial reading of *Lau v. Nichols*, 414 U. S. 563 (1974), the Court of Appeals reaffirmed its previous holding that "no private cause of action lies under Title IX in the circumstances of this case." 559 F. 2d at 1077-78; Cert. Pet. A-34.

A petition for rehearing *en banc* on all jurisdictional grounds asserted in the amended complaint was subsequently denied.

Only the Title IX issue was raised in the petition for *certiorari*.

2. The Court of Appeals noted in its opinion on rehearing:

[W]e were also curious as to why the Department of Health, Education and Welfare, which had consistently supported its codefendants' position that no private cause of action lies under Title IX, did an about face on the merits of that issue in its answer to plaintiff's petition for rehearing. Unfortunately, neither the Department's answer nor its subsequent brief on rehearing explains why the Department no longer believes that "Title IX's administrative procedural remedies were meant to suffice in enforcing Title IX's prohibitions against sex discrimination." Citing HEW's Supplemental Brief. Cert. Pet. A-28; 559 F. 2d at 1080.

SUMMARY OF ARGUMENT.

I.

The underlying issue is the balance between the freedom of a university to select its student body and the implementation of the Congressional policy expressed in Title IX of the Education Amendments of 1972 that no person be excluded on the basis of sex from participation in any graduate admission program receiving federal money.

Petitioner would subject the admissions decisions of universities to judicial scrutiny at the behest of a disappointed applicant on a case-by-case basis.

Petitioner's own situation illustrates the exposure. She was one of 5,400 applicants for 104 positions in the 1975 entering class of The University of Chicago Pritzker School of Medicine. Over 2,000 unsuccessful applicants had academic qualifications superior to hers. Yet she claims she was denied admission because of her age and sex.

We contend that subjecting individual admissions decisions to judicial inquiry before development of a national policy on an alleged discriminatory criterion threatens academic freedom and would force admissions decisions to be made solely on quantifiable factors such as test scores—a result not in the public interest. HEW has recognized that the issues raised by petitioner in her administrative complaints are of first impression and national in scope and that national policy must be developed. Trial courts are ill-equipped for this task; Congress did not intend they perform this function. The flexibility of the administrative procedure Congress provided permits a broad approach to an issue such as that raised by petitioner. The judiciary is not excluded; but its role is limited to review after agency action.

II.

Title IX of the Education Amendments of 1972 was based on Title VI of the Civil Rights Act of 1964; their relevant terms, except for the description of the prohibited discriminatory conduct, are identical. Title IX declares a policy of non-discrimination in federally funded education programs; provides a detailed administrative procedure for effectuating the policy by issuance of general rules, regulations or orders; provides for voluntary compliance and administrative hearing and eventual fund termination if voluntary compliance is not forthcoming. Judicial review of agency action is provided. The plain terms of the Title support the conclusion of the Court of Appeals that the express provision of a sophisticated scheme of administrative enforcement excludes any private judicial remedies other than judicial review of agency action.

The conclusion is reinforced by an examination of the setting of Title VI—the prototype for Title IX. Title VI was part of the Civil Rights Act of 1964 which included Titles relating to prohibition of other forms of discrimination, including voting rights, public accommodations, public education and employment. The other Titles all provide for a private right of action by the aggrieved party. Only Title VI of the non-discrimination Titles fails to provide a private right of action. The omission could not be inadvertent.

The contemporaneous statements of the proponents of Title VI are consistent with the language of the Title. The first section of the Title was a declaration of policy to be implemented through the administrative procedure spelled out in the second section. Typical is the statement of Senator Humphrey, one of the principal architects of the 1964 Civil Rights Act, in describing Title VI: "Section 602 is the implementing section to the general policy laid down in Section 601." 110 Cong. Rec. 8978. The primary purpose was to end discrimination, not to terminate funding—but the purpose was to be achieved

through the administrative process with primary reliance on voluntary compliance.

A specific proposal was made to include an independent private right of action, but this was rejected.

Title IX—adopted eight years after Title VI—was described by Senator Bayh, its principal sponsor, as “identical language, specifically taken from Title VI,” requiring “notice and the normal administrative procedures.” 117 Cong. Rec. 30407. Contemporaneous amendment of other statutes to specifically provide a private right of action manifests an intent to limit Title IX to the administrative process, as Senator Bayh’s statements clearly implied.

Apart from the judicial review provisions of Titles VI and IX, the doctrine of exhaustion of remedies would require that the administrative procedure established by Congress be pursued before judicial intervention. Lower court decisions support the doctrine. HEW itself has stated that it “should be allowed to fulfill its Title VI [and presumably Title IX] responsibilities, and exercise its expertise so that if a judicial determination need ever be made, it can be done on the basis of a thorough administrative record.”

III.

Petitioner’s reliance on subsequent legislation and prior decisions do not support her claim that they manifest a congressional intent and judicial recognition of an independent private right of action.

The three statutes—The Rehabilitation Act of 1973, The Age Discrimination Act of 1975, and the Civil Rights Attorney’s Fees Awards Act—shed no light on congressional intent in 1964 or 1972 when Titles VI and IX, respectively, were adopted.

In none of the prior decisions cited by petitioner, federal respondents, or *amici* supporting petitioner, was the issue of a private right of action expressly raised, briefed or con-

sidered. All but two involved public officials or agencies and hence jurisdiction was not an issue. In the two cited cases which concerned private parties, the defense was that the statute was not applicable; jurisdiction was not an issue. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S. D. Ohio 1976); *Hawthorne v. Kenbridge Recreation Association*, 341 F. Supp. 1382 (E. D. Va. 1972). The instant case is the first reported case in which the issue of an independent private right of action under Titles VI or IX was directly raised and fully briefed.

IV.

Administrative complaints were filed with HEW prior to the start of this litigation; on-site investigations of petitioner’s administrative complaints were completed more than 2½ years ago; HEW has told petitioner that her administrative complaints raise issues “of first impression and national in scope,” and that “national . . . policy must be developed.” In June 1976 she was “assured that we will move as expeditiously as possible in this matter.” Cert. Pet. A-35.

HEW, while arguing to this Court there is no inconsistency between an independent right of action and the administrative procedure, has advised the Court that it will act on petitioner’s administrative complaints *if* this Court decides she has no private right of action.

It is our position that HEW should complete the development of a national policy as it assured petitioner it would do. Petitioner is entitled to the alternate remedy she has requested—recourse against HEW under Section 706 of the Administrative Procedure Act. Her remedy is not in an independent private action against these respondents.

ARGUMENT.

I.

Introduction.

"The number of qualified, indeed highly qualified, applicants for admission to existing medical schools in the United States far exceeds the number of places available. Wholly apart from racial and ethnic considerations, therefore, the selection process inevitably results in the denial of admission to many *qualified* persons, indeed, to far more than the number of those who are granted admission." Justice Blackmun.³

The "ultimate question," observed Justice Blackmun, is: "Among the qualified, how does one choose?" *Bakke*, 98 S. Ct. at 2808.

This case underlines the problem. Petitioner met the minimum qualifications required for application. She was one of over 5,400 applicants for 104 places in the 1975 entering class at The University of Chicago Pritzker School of Medicine. 559 F. 2d at 1067; Cert. Pet. A-3⁴.

Geraldine Cannon claims she had higher academic qualifications than a substantial portion of the students admitted by each school. Pet. Br. 3. The facts belie the claim: her Medical College Admission Test score ("MCAT") in mathematical skills placed her in the lowest 20% of the applicant group at The University

3. *Regents of the University of California v. Bakke*, 98 S. Ct. 2733, 2806 (1978), hereafter called "*Bakke*."

4. The statistical data relating to Ms. Cannon derives from an affidavit of the Dean of Students and Director of Admissions of The University of Chicago Pritzker School of Medicine, submitted in support of The University's motion to dismiss or for summary judgment. App. 24-28. The ratio of applicants to acceptances at Northwestern University's School of Medicine for the same year was 80 to 1. The admissions practices at Northwestern are similar to those at Chicago. 559 F. 2d at 1067; Cert. Pet. A-3n, 1; Joint Br. in Opposition, 4n2.

of Chicago Medical School; her science score placed her in the lower half of the applicant group. There were at least 2,000 *unsuccessful* applicants with better academic qualifications than petitioner. 559 F. 2d at 1067; App. 27.

Upon being informed that she was not selected for admission, Cannon wrote to the Dean of Students of The University of Chicago Medical School, who was also Director of Admissions, expressing her disappointment "because my college grade point average and MCAT scores appeared to be well within the published range for such academic qualifications." App. 37. The Dean responded that "although your academic credentials were good they fell far below the level of the accepted students in our next entering medical class. Annually the competition for places in our entering class is extremely keen and this year was no exception for we had in excess of 5,400 applicants for the 104 places we had to offer." App. 38.

Petitioner is not satisfied with this explanation. She believes she was excluded from consideration because of her age which she claims was a factor under an alleged policy which discourages older persons from applying for admission at respondent schools. This policy has an adverse impact on women—she claims—because women tend to apply to graduate schools at a later age than men.

The issue here is not whether there is merit to her claim that there is an age criterion, or whether if such a criterion exists it has an adverse impact on women, or whether such a policy discriminates unlawfully against women.⁵

5. The record here shows no disparate impact on women. Over the four year period 1972-1975, 18.1% of the applicants and 18.3% of the entering classes have been female at The University of Chicago Medical School. 559 F. 2d at 1067; App. 26.

A study by the Association of American Medical Colleges under an HEW grant discloses that for the 1976-77 first-year medical class nationally, the mean age of all applicants was 24.1 for men and 24.3 for women. Although a greater percentage of younger than older applicants of both sexes were accepted, older female

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We contend that these questions are for HEW to decide both as a matter of clear congressional intent expressed through an unambiguous statute and as a matter of policy. Whether HEW jurisdiction is considered exclusive or primary it cannot be concurrent.

Our concern here is not that either of the respondent schools may be required ultimately to accept petitioner despite her relatively poor academic qualifications.⁶

Our concern, rather, is the forum in which and the procedure by which these schools must defend their admissions decisions. If petitioner has access to the federal courts independent of the administrative procedure and review provisions of Title IX, then so does any disappointed applicant, male or female.⁷ A claim

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applicants had the advantage over older male applicants at each age bracket. Thus in the age 28-31 bracket, 28.9% of the female applicants and 22.0% of the male applicants were accepted; age 32-37, 23.6% of the female applicants and 16.1% of the male applicants were accepted; age 38 and over, 14.6% of the female applicants and 8.1% of the male applicants were accepted. Of the total applicants, 10.04% of the male applicants and 5.5% of the male acceptances were over 28; 13.09% of the female applicants and 9.05% of the female acceptances were over 28. Descriptive Study of Medical School Applicants, 1976-77, Association of American Medical Colleges, December, 1977 (HEW Contract No. 231-76-0011), 16.

6. We do not concede the existence of an age policy, any disparate impact on women in respondents' admissions policies or practices, and certainly do not concede the "but for" test as did the University of California Medical School at Davis in *Bakke*. There the school conceded it could not prove that Allan Bakke would not have been admitted in the absence of the special admissions program. *Bakke*, 98 S. Ct. at 2743.

7. Stephen Horn, the Vice Chairman of the U. S. Civil Rights Commission, put the matter succinctly:

If Federal law were to provide individuals the opportunity to challenge each admissions decision made by a medical school on the basis of discrimination because of age, these institutions, which are now making necessary, careful and discerning selections without regard to age, are likely to have civil actions filed against them by disappointed applicants who fall beyond

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of discrimination under Title VI of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972 is easily made, however meritorious or groundless. And once in court, the plaintiff has available full discovery. The admissions committees may be deposed; the records of all applicants may be examined. However the burden is placed, the judiciary is fully implicated.

"The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 98 S. Ct. at 2760. This freedom is seriously threatened if admissions decisions are subject to judicial inquiry on a case-by-case basis at the behest of disappointed applicants who, like petitioner here, cannot accept the fact that others were better qualified.

An individual admissions decision cannot be reviewed in isolation. Courts would be required to make comparisons involving the objective or quantifiable credentials of thousands of unsuccessful as well as successful applicants. Many of the criteria are subjective or non-quantifiable. See, for example, the Harvard College Admissions Program set out in *Bakke*, 98 S. Ct. at 2764-66.

The University of Chicago Pritzker School of Medicine "strives to make its decision on the basis of the ability, achievement, personality, character, and motivation of the candidates." Its admission procedure involves "a preliminary screening of all applicants on the basis of their intellectual qualifications."⁸

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the mean age of the applicant pool. Even though most, if not all, such actions will demonstrate that the adverse decision was not based upon age but upon other criteria, the expenditure of both human and financial resources in defending against such actions will exact a heavy toll and will not serve the public interest.

The Age Discrimination Study, U. S. Commission on Civil Rights (December, 1977), 107.

8. Petitioner's application was eliminated at this preliminary screening. App. 26.

From the group that passes this screening,

final selection is made on the basis of the personal qualifications of the applicants. Honesty, intellectual curiosity, imagination, cooperativeness, friendliness, and a willingness to work long hours are a few of the desired qualities . . . Since no tests can measure adequately the personal qualifications of an applicant, the Committee relies heavily upon the reports from premedical committees, premedical advisors, instructors, and others who may know the student well and who write on his behalf. The proper selection of applicants is of significance not only to the University of Chicago but to the public as well. App. 33.

If the admissions committees of graduate schools must justify the application of these criteria in individual law suits the danger is great that student bodies will be selected on the basis of quantifiable factors alone. This result would be contrary to this Court's recognition in *Bakke* that universities must be given the discretion to determine and weigh those factors they consider appropriate in the selection of their student bodies. Furthermore, selection on the basis of quantifiable factors alone is antithetical to the achievement of diversity recognized as a desired goal by this Court in *Bakke*.⁹

9. The U. S. Commission on Civil Rights has described with approval the reliance on non-quantifiable factors by most medical schools in its June 1978 Report "Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools" (at 52):

In sum, admissions based solely on quantifiable indicators appear to be the exception at the majority of law and medical schools throughout the United States. More than two-thirds of all American law schools specifically state that admissions decisions are based on factors beyond grades and test scores. The 117 medical schools emphasize, without exception, that admissions are not based on quantifiable factors alone—character, personality, age, residence, general health, recommendations, background (geographic, economic, ethnic, or racial), and extracurricular activities are among other areas of consideration. Most schools choose to employ the admissions process as an effort to come to a broader understanding of the applicant as both a student and a member of society. See also *id.* at 38-39.

If petitioner's view were to prevail, the answer to Justice Blackmun's question—"Among the qualified, how does one choose?"—is that the trial judge chooses.

We do not claim these schools or other private graduate schools are immune from scrutiny. But claims of discrimination in admissions policies should not be settled on a case-by-case basis by federal judges.¹⁰ This is not the plan of Title VI or Title IX. The statutory procedure is investigation, conciliation, compromise and voluntary compliance. The procedure preserves the right of the school to challenge adverse agency findings through judicial review and ultimately to reject federal financial assistance if matters of overriding principle are involved.¹¹ Titles

10. Title IX, of course, covers more than admissions policies. Thus, if the judiciary were to become involved it would be obliged to review such matters as grades, class advancement, and even child care facilities for students with children. See, e.g., *De La Cruz v. Tormey*, No. 76-3355 (9th Cir. Sept. 13, 1978).

11. The brief for the federal respondents criticizes the statement in Justice White's concurring opinion in *Bakke* that even if private suits were permitted under Title VI and a court held a practice to be discriminatory, the recipient of federal funds would have the choice of ending the discriminatory practice or refusing the federal funding. 98 S. Ct. at 2798. Justice White's view was that permitting a private right of action would circumvent the procedural requirements precedent to terminating federal funding under Title VI (and by implication under Title IX). "This analysis," argue the federal respondents, "ignores the personal relief that may be awarded in a private suit under Title VI or Title IX, without regard for whether the recipient of federal funds chooses to accept or reject such funds in the future. In this case, for example, if petitioner proves the sex discrimination she has alleged, the district court may order her admission to medical school, even if the University of Chicago and Northwestern University never accept another penny of federal aid." Fed. Resp. Br. 55.

This conclusion is inconsistent with the intent of Title VI: "Sometimes those eligible for Federal assistance may elect to reject such aid, unwilling to agree to a non-discrimination requirement. If they choose that course, the responsibility is theirs." Sen. Ribicoff, 110 Cong. Rec. 7067.

A similar option was recognized in *Rosado v. Wyman*, 397 U. S. 397 (1970) (discussed below, n. 24). There this Court held the district court correctly concluded that New York State's Aid to

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VI and IX do not contemplate that a student body will be determined by injunction.

Academic freedom—"a special concern of the First Amendment"—is the ultimate issue. Justice Powell, *Bakke*, 98 S. Ct. at 2760. ". . . [I]nterference by the judiciary must be the rare exception and not the rule." Justice Blackmun, *Bakke*, 98 S. Ct. at 2807.

II.

TITLE IX DOES NOT PROVIDE AN INDEPENDENT PRIVATE RIGHT OF ACTION: IMPLICATION OF SUCH A RIGHT IS INCONSISTENT WITH ITS TERMS, PURPOSE AND HISTORY.

We agree with petitioner that Title IX of the Education Amendments of 1972 was patterned after Title VI of the Civil Rights Act of 1964—the statute considered by the Court in *Bakke*. Their texts are virtually identical; the proposers of Title IX said it was based on Title VI, and no doubt the draft of the bill started as a photocopy of Title VI. Pet. Br. 8. We agree that the legislative history of Title VI is highly relevant to a consideration of the meaning and intent of Title IX. If there is an independent private right of action under Title VI there is also one under Title IX.

We simply disagree with petitioner's claim that Title VI created an independent private right of action.

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Families with Dependent Children did not meet the requirements of the federal statute under which funding was provided. The district court had enjoined the State from reducing the payments. With respect to the remedy, this Court pointed out that "New York is, of course, in no way prohibited from using only *state* funds according to whatever plan it chooses. . . . [P]etitioners are entitled to declaratory relief and an appropriate injunction by the District Court against the payment of *federal* monies according to the new schedules, should the State not develop a conforming plan within a reasonable period of time. 397 U. S. at 420. (The Court's emphasis.)

A. The Terms of the Statute.

Petitioner and *amici* supporting her read both Titles VI and IX as though they included only their first sections: § 601 of Title VI, 42 U. S. C. § 2000d and § 901 of Title IX, 20 U. S. C. § 1681. In fact, in the Statutes Involved sections of petitioner's and federal respondents' briefs, reference is made only to § 901.¹²

But it is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'" *Richards v. United States*, 369 U. S. 1, 11 (1961).

The first section of each Title (§ 601 of Title VI and § 901 of Title IX) declares the policy that no person shall be subjected to discrimination under programs receiving federal financial assistance—on the ground of race, color or national origin under Title VI and on the basis of sex in Title IX. Title VI applies to all programs; Title IX is limited to educational programs.

The second section (§ 602 and § 902) provides that the federal agency extending the financial assistance "is authorized and directed to effectuate the provisions of [§ 601 or § 901] . . . by issuing rules, regulations or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance . . ." Failure to comply with any requirement adopted by the agency may result in termination of financial assistance "after opportunity for hearing." No action to terminate may be taken, however, unless "compliance cannot be secured by voluntary means." In the event of termination of financial assistance, the agency is re-

12. The relevant portions of Titles VI and IX are set out as an appendix to this brief.

quired to file a report with the appropriate congressional committee "of the circumstances and the grounds for such action."

The third section (§ 603 and § 903) of each title provides for judicial review of agency action taken under the second section. "Any department or agency action taken pursuant to [§ 602 or § 902] of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds."

We submit that a straightforward reading of the full Title clearly shows that the policy declared in the first section is to be effectuated by the agency responsible for funding, that compliance is to be sought by the agency through voluntary means and, failing this, funding is to be terminated. Any action the agency takes is subject to judicial review. This is the means of enforcement.

Nothing here suggests, explicitly or implicitly, an intent to create an independent private right of action. Rather a plain reading of the statute shows the reverse. Else why the careful spelling out of the enforcement procedure and the provision for judicial review of "any agency action."

A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *National Railroad Passenger Corp. [Amtrak] v. National Ass'n of Railroad Passengers*, 414 U. S. 453, 458 (1974), citing *Botany Worsted Mills v. United States*, 278 U. S. 282, 289 (1929).¹³

13. See also *Santa Clara Pueblo v. Martinez*, 98 S. Ct. 1670, 1679 (1978); *Goldman v. First Federal Savings & Loan Ass'n of Wilmette*, 518 F. 2d 1247, 1250 n. 6 (7th Cir. 1975):

"If the statute expressly authorizes proceedings to enforce its provisions and the regulations promulgated under it, ordinarily it will be inferred that no other means of enforcement, such as by private cause of action, was intended by the legislature." [Citations omitted.] (per Judge, now Justice, Stevens.)

Petitioner and her *amici* argue that such a reading leaves a complainant without remedy; that the first section created "personal rights" and this implies the right to assert the "right" independent of the administrative enforcement procedure.

The argument assumes its answer. The "right" created is defined by the statute which creates it. If the statute, read as a whole, does not contemplate an independent right of action, then no such right can be drawn from one section alone.

The National Labor Relations Act provides in section 7 (29 U. S. C. § 157) that—

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

This, too, is a "personal right." But it has never been suggested that an employee terminated because he was trying to bring a union into a plant had an independent cause of action against the employer. The administrative procedure under the NLRA limits the scope of this "right", and resort to the processes of the National Labor Relations Board is the only means of its enforcement. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261 (1940).

The remedy under Titles VI and IX lies in the administrative procedure created under these statutes. Complaint may be made to the funding agency, conciliation and voluntary compliance may be sought, and the agency has the ultimate power to terminate the financial assistance.¹⁴

14. HEW regulations provide that a person claiming to be subjected to discrimination may file a complaint with HEW within 180 days of the alleged discrimination, a period which may be extended by HEW. 45 C. F. R. § 80.7(b). HEW is to promptly investigate the complaint, and must attempt to resolve the matter by informal

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That this remedy may not be all that petitioner desires is irrelevant; it is what Congress provided. Petitioner has recognized the efficacy of the administrative procedure, having invoked it, and having asked the trial court and this Court to require HEW to carry out its statutory obligation respecting her administrative complaint. App. 19. "If there is no private right of action against the schools under Title IX, there must be recourse against HEW for the exclusive remedy it must provide thereunder." Pet. Br. 20.¹⁵

B. The Civil Rights Act of 1964.

The failure of Congress to provide a private right of action in Title VI—and by imputation in Title IX of the Education Amendments—was not an oversight.

Title VI was adopted as part of the Civil Rights Act of 1964, Pub. Law. 88-352, 78 Stat. 241. Other Titles of the Act cover voting rights (Title I), public accommodations (Title II), public facilities (Title III), public education (Title IV), and equal employment opportunity (Title VII). Title V relates to the Commission on Civil Rights; Title VIII to registration and voting statistics; Title IX to intervention and procedure after removal in civil rights cases; Title X establishes a community relations service. The final title, Title XI, miscellaneous, relates primarily to contempt and the authority of the Attorney General to institute proceedings.

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means. 45 C. F. R. § 80.7(c), (d)(1). The complainant is notified if the investigation does not warrant action (45 C. F. R. § 80.7(d)(2)); if the matter proceeds to hearing, "the complainant . . . shall be advised of the time and place of the hearing" (45 C. F. R. § 80.9(a)), and may petition for participation in the hearing as amicus. 45 C. F. R. § 81.23.

15. Both respondent schools have provided HEW with all data requested by it in connection with its investigation of petitioner's administrative complaint. The Court of Appeals was so advised during the course of oral argument in June 1976. HEW has stated that it has completed its on-site investigation. Cert. Pet. A-35.

An examination of the full Civil Rights Act clearly shows that the enforcement procedures were carefully thought out Title by Title. Provision for a right of action by the "person aggrieved" is made under certain of its Titles and not others: the Attorney General is authorized to institute suit in certain limited circumstances, and any pre-existing right of private action on constitutional grounds is specifically preserved against the presumption that if not expressed it might be abrogated. No provision for action either by the Attorney General or by the "person aggrieved" is found under Title VI—only an administrative remedy.

Title I, voting rights, makes express provision for suits by the Attorney General in the event of violation. 42 U. S. C. § 1971(c). Section 1971(d) also provides that "district courts . . . shall have jurisdiction of proceedings instituted pursuant to this section . . . without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."

Title II, discrimination in places of public accommodation, expressly provides that any "person aggrieved" may institute "a civil action for preventive relief," and intervention by the Attorney General is permitted if the case is of "general public importance." 42 U. S. C. § 2000a-3. The Attorney General may initiate the suit if he believes there is a "pattern or practice of resistance." § 2000a-5.

Title III, desegregation of public facilities, also makes specific provision for suit by the Attorney General. 42 U. S. C. § 2000b. Since the Title covers public facilities "owned, operated, or managed by or on behalf of any State or subdivision thereof other than a public school or public college," and thus would also be subject to private suit as state action under 42 U. S. C. § 1983 (the Civil Rights Act of 1871), Title III also provides: "Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in any facility covered by this title." 42 U. S. C. § 2000b-2.

Title IV, desegregation of public education, provides judicial remedies similar to Title III. Suits by the Attorney General are specifically sanctioned, and the right of the individual to bring suit is expressly preserved. 42 U. S. C. §§ 2000c-6, 2000c-8.

Title VII, equal employment opportunity, establishes an administrative procedure before the Equal Employment Opportunity Commission and then a trial de novo within a specified period after the administrative agency terminates its role. "... [A] civil action may be brought . . . by the person claiming to be aggrieved. . . . Each United States district court . . . shall have jurisdiction of actions brought under this title." 42 U. S. C. § 2000e-5(f)(1) and (3).

Title IX of the 1964 Civil Rights Act—intervention and procedure after removal—permits intervention by the Attorney General in any action claiming denial of equal protection under the Fourteenth Amendment if he considers it of "general public importance." 42 U. S. C. § 2000h-2.

It is Title VI alone of the non-discrimination titles of the 1964 Civil Rights Act which makes no provision either for a right of action by the "person aggrieved" or for intervention or initiation of suit by the Attorney General. Only Title VI provides for an administrative procedure "to effectuate the provisions of . . . this title." Only Title VI provides for judicial review after agency action. 42 U. S. C. §§ 2000d-1, 2000d-2.

In short, when Congress adopted the Civil Rights Act of 1964 it did not intend that Title VI included a private right of action.¹⁶

16. Petitioner turns the argument around. Since Congress provided an express right of action under Title II—public accommodations—and Title VII—employment—it would have been an "outrage" and "unthinkable" not to do the same under Titles VI and IX. Pet. Br. 16. Describing what Congress did in pejorative terms does not advance the argument.

Unlike Titles II and VII, Titles VI and IX were based by Congress not upon the broad Commerce Clause but on the narrower

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C. Legislative History.

The course of Titles VI and IX through the legislature supports the conclusion that no independent private right of action was intended; that the first section—601 of Title VI and 901 of Title IX—was a statement of policy to be enforced through the procedures of Sections 602 and 902.

1. Title VI.

The clearest evidence that no private right of action was intended comes from statements of the bill's primary sponsors. Justice White has pointed out in *Bakke* that an effort was ini-

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ground that the government has the right to fix the terms under which federal funds are allotted. See, e.g., Remarks of Senator Humphrey at 110 Cong. Rec. 6546.

For this reason, Executive Order 11246 is more analogous to Titles VI and IX. The Order, prohibiting employment discrimination on the basis of race, color, religion, sex or national origin by those doing business with the federal government, with its accompanying regulations, establishes an administrative scheme similar to Title IX—investigation, conciliation, hearing, and ultimately, termination of government contracts. Educational institutions, such as the respondents here, are subject to its provisions. Although the federal agencies responsible for enforcement of E. O. 11246 may be judicially compelled to carry out the Order, a private right of action against the contractor alleging violation of the Order may not be maintained. *Cohen v. I. I. T.*, 524 F. 2d 818, 822 n. 4 (7th Cir. 1975), cert. denied 425 U. S. 943 (1976); *Farmer v. Philadelphia Electric Co.*, 329 F. 2d 3, 9 (3d Cir. 1964); *Gnotta v. United States*, 415 F. 2d 1271 (8th Cir. 1969) cert. denied 397 U. S. 934 (1970); *Farkas v. Texas Instruments, Inc.*, 375 F. 2d 629 (5th Cir.), cert. denied 389 U. S. 977 (1967); *Legal Aid Society of Alameda County v. Brennan*, 381 F. Supp. 125 (N. D. Cal. 1974).

That it is only educational institutions receiving federal funds which are covered by Title IX may also reflect congressional intent to interfere as little as possible in an area where the interests of academic freedom and its First Amendment implications place the legislation on a different footing from Titles II and VII. The amici brief of the Federation of Organizations for Professional Women, et al. makes this point at 12, 13 n. 3. See also Fed. Resp. Br. 19.

tially made to include such a provision but it was unsuccessful. *Bakke*, 98 S. Ct. at 2797.¹⁷

The statement of Senator Keating, one of the principal sponsors of Title VI, is particularly significant. Justice Stevens concluded in *Bakke* that the right of an individual to maintain a private right of action "is amply supported in the legislative history of Title VI itself." In support, a statement of Senator Ribicoff was cited to the effect that action to end discrimination is preferable to action to end the payment of funds. *Bakke*, 98 S. Ct. at 2815 n. 28. As we show later in this section, this comment when read in context does not support any conclusion as to the procedure to end discrimination.

In any event, during the course of a lengthy presentation by Senator Ribicoff, and shortly after he made the comment referred to above, Senator Ribicoff yielded the Senate floor to Senator Keating, who then said (110 Cong. Rec. 7065):

"As Senator RIBICOFF has pointed out, both he and I felt that the original title VI proposal was objectionable in that it emphasized the cutting off of Federal funds rather than the ending of discrimination. We favored a provision allowing the administrator to institute a civil action to eliminate the discrimination and we favored judicial review of the determination to withhold Federal funds.

"Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, *we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill.* However, both the Senator from Connecticut and I are grateful that our other suggestions

17. An earlier rejected version of the bill providing for an independent right of action is discussed in the "Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H. R. 7152", House Report No. 914 of the 88th Congress, 1st Session at 86.

were adopted by the Justice Department." (Emphasis added.)¹⁸

On the House side, Representative Celler assured:

Actually, *no action whatsoever* can be taken against anyone until the Federal agency involved has advised the appropriate person of his failure to comply with non-discrimination requirements and until voluntary efforts to secure compliance have failed. 110 Cong. Rec. 1519. (Emphasis added.)

The correlation between sections 601 and 602 was clearly articulated:

SENATOR HUMPHREY: Section 602 is the implementing section to the general policy laid down in Section 601. (110 Cong. Rec. 8978.)

Again—

SENATOR HUMPHREY: First of all, section 601 states general policy. Section 602 states the means of effectuating that general policy, the implementation and the exclusion. (110 Cong. Rec. 13378.)

When an amendment was proposed relating to the exclusion of deposit and loan insurance and guarantees referred to by Senator Humphrey, Senator Pastore, another sponsor of Title VI, commented:

Mr. President, frankly, I think what we are beginning to do is kick a dead horse. The trouble with the sponsors of the present amendment is that they are not reading Title VI as a whole . . .

Section 602 is just as much a part of Title VI as is section 601. Section 601 is a statement of policy. Section 602 is the section that gives authority to the agencies . . . (110 Cong. Rec. 13435.)

18. See also comments of Sen. Kuchel, 110 Cong. Rec. 6562, and Rep. Gill, 110 Cong. Rec. 2467.

Senator Javits questioned Senator Humphrey:

SENATOR JAVITS: So my first question is whether the able Senator from Minnesota understands very clearly that sections 601 and 602 . . . establish policy and provide for the carrying out of that policy, which would require the HEW administrators to act with respect to programs which are segregated . . .

SENATOR HUMPHREY: The Senator's interpretation of section 601 and section 602 is proper and correct. (110 Cong. Rec. 12719.)¹⁹

Petitioner and *amici* argue that the purpose of Title VI (and presumably Title IX) was to end discrimination—not to cut off federal financial assistance. We agree. The dispute is not in the purpose but in the means of effectuating the non-discrimination policy established in the first section of Titles VI and IX.

Again Senator Humphrey, one of the principal architects of the Civil Rights Act of 1964, spoke to this:

Termination of assistance, however, is not the objective of the title—I underscore this point—it is a last resort to be used only if all else fails to achieve the real objective, the elimination of discrimination in the use and receipt of Federal funds. This fact deserves the greatest possible emphasis: *Cutoff of Federal funds is seen as a last resort, when all voluntary means have failed.* (110 Cong. Rec. 6544.) (Emphasis added.)

Senator Pastore made the same point:

When we read these two pages, we understand that the whole philosophy of title VI is to promote voluntary compliance. It is written right in the law. There shall be the voluntary compliance as the first step. . . . (110 Cong. Rec. 13334.)²⁰

19. The same point is made repeatedly. See 110 Cong. Rec. 5091, 8978, 13333, 13378.

20. See also 110 Cong. Rec. 6048, 6546, 12720, 13333.

Senator Proxmire reviewed the various procedural steps built into the Title. He summarized:

That means that if there is discrimination in a Federal program, first a complaint must be made to the department. For example, it might be the Department of Health, Education and Welfare. The Secretary of the Department of Health, Education and Welfare must then devote days, weeks, and perhaps months *in an effort to secure a voluntary agreement which would end the discrimination.* (110 Cong. Rec. 8345.) (Emphasis added.)

The statement of Senator Ribicoff previously referred to came in the midst of a full explanation by him of Title VI. He explained how he and Senator Keating had introduced amendments to improve the original bill and defined their purpose:

The junior Senator from New York and I wanted to be sure that administrators of Federal programs were under an obligation to take action to end discrimination in the programs under their jurisdiction. We wanted to be sure they had a choice of remedies, with cutoff of funds to be used only as a last resort. Finally, we wanted to be sure that proper procedures, including judicial review, were followed. (110 Cong. Rec. 7065.)

This statement, following within paragraphs of the statement relied upon by Justice Stevens, makes crystal clear that although the primary goal was to end discrimination, this was to be achieved by the administrators of funding agencies under the "proper procedures, including judicial review" found in Section 602.

Senator Ribicoff went on clearly and succinctly to describe the purpose and procedure for enforcement of Title VI. The first section, he explained, "would establish the basic principle that no person is to be discriminated against because of race, color, or national origin" under any federally assisted program. "Section 602 then *would establish the procedure to be followed by executive agencies in implementing the non-discrimination requirements of Section 601.*" (Emphasis added.) He detailed the pro-

cedural steps which were necessary. The fourth step was "The agency must then determine that compliance could be secured by voluntary means." 110 Cong. Rec. 7066.

In reference to the provision of section 602 that compliance could be effectuated "by any other means authorized by law," Senator Ribicoff explained that this referred to possible action by the Attorney General under *Title IV* (not VI) to institute a lawsuit "if the recipient were a school district or public college." He described other possible agency action. *Id.*

He summarized his review: "That is the procedure of Title VI. It is fair and reasonable." 110 Cong. Rec. 7066.

Nowhere did Senator Ribicoff or any other legislator in explanation of Title VI claim or suggest at any time that a possible means of enforcement was an action by the "person aggrieved," other than to state that this was considered but not included, as did Senator Keating. *See, e.g.,* remarks of Senator Pastore, 110 Cong. Rec. 7063; Senator Humphrey, 110 Cong. Rec. 6545-46; Rep. Celler, 110 Cong. Rec. 2468.

It is simply clear beyond dispute that Title VI created no independent private right of action. The meaning of the Act is plain, it is unambiguous and allows of no interpretation other than that the administrative procedure established under its terms, with subsequent judicial review, is the exclusive means of enforcement.²¹

21. The U. S. Civil Rights Commission, which has oversight authority on enforcement of civil rights statutes, advises persons who claim discrimination under Title VI to file a complaint with the agency involved, and if the discrimination is in the area of employment, advises that charges be filed with the Equal Employment Opportunity Commission under Title VII or the appropriate state or local fair employment practice agency. With respect to private litigation, the Commission states: "If the recipient is a public institution, such as a public hospital or a public school, the appropriate legal action may be a civil rights suit to secure a court order barring the unlawful practices under Title III or IV, respectively, of the Civil Rights Act of 1964." There is no mention of a private right of action as a possible remedy under Title VI. *See Civil Rights Under Federal Programs—An Analysis of Title VI of the Civil Rights Act of 1964. U. S. Commission on Civil Rights, Clearinghouse Publication No. 1, pp. 12-13 (1968).*

2. Title IX.

The bill which ultimately became Title IX of the Education Amendments of 1972 was proposed in 1971 by Senator Bayh, its chief sponsor.

Senator Bayh introduced the bill on August 6, 1971. It was then in substantially the same form—insofar as here relevant—as when it was finally adopted in 1972. He explained at the time of introduction (117 Cong. Rec. 30404):

Sections 602-604 [Secs. 902 and 903 of Title IX as finally adopted] *contain enforcement, judicial review, and other technical provisions for the implementation of the section 601 [901] prohibition.* These provisions are similar to those provided under title VI of the 1964 Civil Rights Act—*forbidding discrimination in federally assisted programs—which does not presently include a prohibition on sex discrimination.* (Emphasis added.)

There is no suggestion here of enforcement through direct suit by the "person aggrieved."

The subject of direct judicial intervention was not overlooked by Senator Bayh at this time. One section of the bill, ultimately adopted as Section 906 of Title IX (Public Law 92-318, 86 Stat. 375), amended Titles IV and IX of the original Civil Rights Act of 1964.²² The purpose of the amendment was to allow for suits by the Attorney General in the event of sex discrimination in public schools and in suits for violation of Fourteenth Amendment rights on account of sex as well as race, color, religion or national origin. These amendments were necessary, explained Senator Bayh, so that the "Attorney General can initiate legal proceedings on behalf of individuals alleging that they have 'been denied admission to or not permitted to

22. Title IV of the 1964 Act is 42 U. S. C. § 2000c, *et seq.* Title IX of the 1964 Act was the "intervention" title of that Act, and is 42 U. S. C. § 2000h, *et seq.* The sections amended by Section 906 of the 1972 Act are 42 U. S. C. § 2000c-6 and 42 U. S. C. § 2000h-2.

continue in attendance at a *public college*.' " 117 Cong. Rec. 30404. (Emphasis added.)

The necessity to amend other titles of the Civil Rights Act to permit suits by the Attorney General in cases of sex discrimination in public institutions or to permit intervention by the Attorney General in suits for deprivation of constitutional rights is completely inconsistent with the theory that the new bill already allowed private suits as a means of enforcement.

Senator Dominick was concerned about the apparent absence of provision for a formal hearing on a charge of discrimination. This colloquy followed (117 Cong. Rec. 30407-08 (1971)):

MR. BAYH. This is identical language, specifically taken from title VI of the 1964 Civil Rights Act, Public Law 88-352.

MR. DOMINICK. Right; I understand that.

MR. BAYH. *This title does require hearings and notice, and the normal administrative procedures are set out.*

MR. DOMINICK. Then the Senator is, in effect, contending that there would be hearings and the right to be heard and all the usual procedures along that line?

MR. BAYH. The same procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder would *be equally applicable to discrimination in this respect*. (Emphasis added.)

On February 28, 1972, Senator Bayh again introduced the bill which ultimately became Title IX. 118 Cong. Rec. 5802. Senator Bayh again discussed the need to amend other titles of the 1964 Civil Rights Act to allow for direct judicial intervention. He explained (118 Cong. Rec. 5808):

There are, of course, other loopholes in the Civil Rights Act [of 1964] where sex was not mentioned. To correct one more, this amendment would permit the Attorney General to initiate litigation concerning the denial on the basis of sex of admission to or continued attendance at

a public college, and to intervene in litigation already commenced by others regarding the denial of *equal protection* of the laws on the basis of sex. (Emphasis added.)²³

What is thus clearly not provided by the 1964 Civil Rights Act or by Title IX of the Education Amendments of 1972 is a suit by the Attorney General or a suit by the "person aggrieved" against a private institution where there is no state action and thus not within the purview of the Fourteenth Amendment or 42 U. S. C. § 1983.

In sum, Titles VI and IX by their terms provide a procedure for enforcement of the non-discrimination policy they enunciate. The absence of a provision for an independent private right of action was not inadvertent as both the specific inclusion of such

23. *Amici* National Urban League, et al., argue that the decision below creates a "two-tiered" enforcement scheme, one for public institutions with direct access to the courts, and another for private institutions where the administrative procedure would have to be followed. *Amici* Br. 3. Petitioner makes the same point, contending that "the identical legislative scheme cannot mean one thing in the case of a state program and something else in the case of other programs." Pet. Br. 15.

There is, of course, a "two-tiered" system, but not because Titles VI or IX are to be applied in different ways depending on the private or public nature of the school. The difference is that 42 U. S. C. § 1983 and the Fourteenth Amendment do not apply to private schools. Jurisdiction existed in *Brown v. Board of Education*, 347 U. S. 483 (1954), long before Title VI was enacted. The violation claimed in *DeFunis v. Odegaard*, 416 U. S. 312 (1974) was of the Equal Protection Clause of the Fourteenth Amendment, not Title VI. *Bakke* would still have arisen even if there had been no Title VI because the University of California is a state school. Furthermore, the "two-tiered" system of enforcement was clearly intended by Congress in enacting the Civil Rights Act of 1964 and in Title IX itself. Title IV, for example, specifically provides for Attorney General suits to enforce nondiscrimination in *public* schools only. And in discussing Title VI, proponents mentioned the distinction with approval in explaining how the "other means" language of Title VI would work. (See Remarks of Sen. Ribicoff, 110 Cong. Rec. at 13130 and Sen. Humphrey at 110 Cong. Rec. 8979). With respect to undergraduate schools, Title IX distinguishes between public and private schools, and applies only to "public institutions of undergraduate higher education." § 901(1).

a remedy in other titles of the Civil Rights Act of 1964 and the legislative history of both Titles attest.

The Court of Appeals correctly applied the *Cort v. Ash*, 422 U. S. 66 (1975) tests in concluding that "implication of a private judicial remedy would be inconsistent with the legislative intent and underlying purposes of the statutory scheme." The Court added: "Congress's express provision of a sophisticated scheme of administrative enforcement should be construed as an indication of an implicit legislative intent to exclude any private judicial remedies for violations of Title IX other than the judicial review mechanism Congress made available to private parties in the statute." 559 F. 2d at 1080, 1082; Cert. Pet. A-29, 32.²⁴

24. Many of the *amici* cite *Rosado v. Wyman*, 397 U. S. 397 (1970) and *Allen v. State Board of Elections*, 393 U. S. 544 (1969) as supporting a Title IX private right of action. In *Rosado*, the issue was whether a New York statute relating to calculation of benefits under its federally supported Aid to Families with Dependent Children program was consistent with a provision of the federal Social Security Act requiring certain adjustment factors to be considered by the states in their AFDC programs. HEW had authority to determine whether states were in compliance. The argument was made that the HEW procedure precluded a private action challenging the New York law. The Court upheld the action. The Court found there was no procedure for welfare recipients to trigger and participate in the HEW proceeding. It also concluded that the legislative history was unclear. "... Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding." *Id.*, at 406, 412. Neither circumstance pertains here. The discriminatee under Title VI or Title IX may invoke the administrative procedure, may be allowed to participate, and may have judicial review of final agency action. *Rosado* was distinguished on this ground in *Crawford v. University of North Carolina*, 440 F. Supp. 1047, 1057-58 (M. D. N. C. 1977) and *Mendoza v. Levine*, 412 F. Supp. 1105, 1108-9 (S. D. N. Y. 1976). And here, of course, Senators Humphrey, Ribicoff, Keating and Pastore did not mute their voices.

Although the federal respondents lay great stress on *Allen* (Fed. Resp. Br. 10), its relevance is not apparent. There the Voting Rights Act of 1965 was under scrutiny. Section 5 of the Act provided that any State Act relating to voting qualifications or prerequisites to voting or standard voting practice or procedure, could not take effect

(Footnote continued on next page)

D. Exhaustion of Remedies.

Sections 603 and 903 of Titles VI and IX provide for "such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." The Court of Appeals below held that this review mechanism was made available by Congress to private parties. 559 F. 2d at 1082; Cert. Pet. A-32.

In any event, and apart from the judicial review provisions of Sections 603 and 903, under the doctrine of exhaustion of administrative remedies no judicial intervention would be appropriate until and after the agency—here HEW—has completed its investigation and review functions under Sections 602 or 902. The exhaustion doctrine has, in fact, been recognized in Title VI litigation and has been advanced by HEW itself. *E.g.*, *Johnson v. County of Chester*, 413 F. Supp. 1299, 1311 (E. D. Pa. 1976); *Feliciano v. Romney*, 363 F. Supp. 656 (S. D. N. Y. 1973).

(Footnote continued from preceding page.)

unless the State received a declaratory judgment from the District of Columbia district court or no formal objection from the Attorney General within a certain period after notice. The issue in *Allen* was whether a court other than the District of Columbia court could at the behest of private parties find that an Act was subject to the declaratory judgment or Attorney General procedures. In upholding the action, the Court distinguished between the declaratory action which could be brought only by the State in the District of Columbia to test the validity of the Act, and the action to determine whether the Act was within the purview of the Voting Rights Act and hence subject to the Voting Act procedures. "A declaratory judgment brought by the State pursuant to § 5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a *private litigant* does not require the Court to reach this difficult substantive issue. The only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. The difference in the magnitude of these two issues suggests that Congress did not intend that both can be decided only by the District of Columbia District Court." 393 U. S. at 558-59. This hardly reaches the issue here. *Allen* may have relevance to whether HEW may be required to perform its statutory obligation, but not to the issue of whether HEW may be bypassed.

Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977) is cited by petitioner, her amici, and the federal respondents, as supporting a private right of action under 29 U. S. C. § 794, the Rehabilitation Act of 1973. There the statute included only the policy provision comparable to sections 601 and 901 and did not include the administrative enforcement features of section 602 and 902 of Titles VI and IX. The court specifically commented upon the exhaustion doctrine in that context (548 F. 2d at 1286 n. 29):

And until effective enforcement regulations are promulgated, Section 504 [29 U. S. C. § 794] in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . *But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a posteriori judicial review.* (Emphasis added.)

The rationale for the judiciary staying its hand was succinctly expressed by this Court under the analogous primary jurisdiction doctrine in *Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 412 U. S. 800, 821 (1973):

Ordinarily, then, a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expresses its view. But when a court issues an injunction pending final determination, one important element of its judgment is its estimate of the probability of ultimate success on the merits by the party challenging the agency action. Depending on the type of error the reviewing court finds in the administrative proceedings, *the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. This is precisely what the doctrine of primary jurisdiction is designed to avoid.* The fact that issuing an injunction may undercut the policies served by the doctrine of primary jurisdiction is therefore an important element to be considered when a federal court contemplates such action. [Citations omitted.] (Emphasis added.)

The need for prior expression by HEW of its views of proper application of Titles VI and IX is even more compelling here than in *Atchison*.

Title VI (and by reference Title IX) were intended to be applied uniformly and on a national basis. The rules "must have broad scope. They must be national. They must apply to all 50 states." Senator Pastore, 110 Cong. Rec. 7059.

"Title VI has been so drawn and so devised as to provide uniformity of rules and regulations . . ." Senator Ribicoff, 110 Cong. Rec. 8423.

The enactment of Title VI "will thus serve to insure uniformity and permanence to the nondiscrimination policy." Senator Humphrey, 110 Cong. Rec. 12720.

"Title VI provides a uniform means of enforcement . . ." Senator Javits, 110 Cong. Rec. 7103.

Sections 602 and 902 require the agency to "effectuate the provisions of section 601 [section 901] . . . by issuing . . . orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

Petitioner's complaint here illustrates the necessity for the development of national policy through a uniform administrative procedure and the inappropriateness of a case-by-case approach. She claims the existence of an age criterion in the admissions policies of medical schools and has filed administrative complaints "against various medical schools in the State of Illinois," including the respondents here. Cert. Pet. A-35; App. 16.

Although we deny that age was a factor in the admissions decision concerning Ms. Cannon (App. 27), yet it is clear from other sources that there is concern about age as a valid criterion in medical school admissions.²⁵

25. Upon the occasion of Allan Bakke's entry to the University of California Medical School at Davis this fall, the Chairman of

(Footnote continued on next page)

A resolution of the age discrimination claim requires a series of decisions—some judgmental, some factual—none of which are amenable to resolution in a case against two medical schools in Chicago. Is there in fact an age criterion in medical schools; if so, does this have a disparate impact on females; if there is an empirically demonstrable bias in admissions against older applicants, is there a gender-based differential; is a gender-based differential significant in light of the fact that HEW is also charged with enforcement of the Age Discrimination Act of 1975 which is analogous to Titles VI and IX; as a matter of policy, may medical schools take age into account—as does the Medical School of the University of California at Davis —“to assure maximum duration of practice.”²⁶

HEW told Ms. Cannon that the issues she raised are “of first impression and national in scope.” She was advised that “national Office for Civil Rights policy must be developed,” and that “the authority for formulating national policy rests in our Headquarters office.” Cert. Pet. A-35.

(Footnote continued from preceding page.)

the Admissions Committee at Davis explained the decision of the school to deny his application in the first instance:

First he was too old. Although we don't have an age limit, we do, because of the scarcity of physicians, like to get qualified applicants as young as possible to assure maximum duration of practice. We don't use age as a cutoff, but tend to look a lot harder at anyone past age 28 or 30. American Medical News, Sept. 15, 1978, p. 18.

The age issue is not limited to medical school admissions. In *Purdie v. The University of Utah, et al.*, Supreme Court of Utah, No. 15209 (Aug. 23, 1978), the Court sent back for an evidentiary hearing the issue of whether the state school's age criterion for admission to its department of Educational Psychology satisfied the rational basis test for a legitimate state purpose under the Fourteenth Amendment.

26. “Graduate admissions decisions, like those at the undergraduate level, are concerned with ‘assessing the potential contributions to the society of each individual candidate following his or her graduation. . . .’” *Bakke*, 98 S. Ct. at 2761 n. 49, quoting from Bowen, Admissions and the Relevance of Race, *Princeton Alumni Weekly* (Sept. 26, 1977).

We concur. The issues are national in scope and national policy ought to be developed by the agency with the expertise and charged with the statutory responsibility to develop such a policy. It is not for the courts to declare the policy, at least not until the agency has acted.

The Court of Appeals correctly recognized that an independent private right of action was not the appropriate vehicle under these circumstances (559 F. 2d at 1074 n. 17; Cert. Pet. A-16):

Another objection to the implication of a private remedy arises where Congress has delegated authority to an administrative agency to enforce the statute. Under the doctrine of primary jurisdiction a court has no jurisdiction to accept a case until the issues, requiring resolution of questions within the agency's area of expertise, have been reviewed by the agency with the special competence to deal with the problem. In this case we believe that the HEW is in a much better position to evaluate the statistics of the applicant and entering classes at the various medical schools. In addition, HEW has the benefit of comparing the local practice to the admission policies on a national level.

Although HEW contends in its brief in this case that private suits under Title IX “would raise no difficulties concerning exhaustion of administrative remedies” or “any primary jurisdiction problem” (Fed. Resp. Br. 58 n. 36), it has elsewhere well stated the reasons why a court should not intervene until after agency action.

In *Terry v. Methodist Hospital of Gary*, Civ. No. 76-373, N. D. Ind.), HEW requested the trial court to stay its hand pending the conclusion by HEW of the administrative process in a Title VI investigation. “. . . HEW should be allowed to fulfill its Title VI responsibilities, and exercise its expertise so that if a judicial determination need ever be made, it can be done on the basis of a thorough administrative record.”

In describing its jurisdiction, HEW told the Indiana court:

The doctrine of primary jurisdiction is closely aligned to that of exhaustion of administrative remedies. It constitutes a judicial recognition that in numerous situations, Congress has established a scheme whereby the expertise of an agency can be first exercised in order to avoid unnecessary litigation and to provide a record which the Court can review. Additionally, the agency can coordinate its decisions nationally so that consistent determinations can be made." Statement in Support of HEW Motion for Reconsideration, October 13, 1977, 6, 10.²⁷

We respectfully submit that the doctrine of exhaustion militates against the implication of a private right of action.²⁸

27. There is considerable confusion in HEW's position. As we have pointed out, HEW initially resisted the *Cannon* complaint, contending there was no independent private right of action. It later reversed its position without explanation and now insists there is a private right of action. Although no reason for the shift of position was offered the Court of Appeals, it now contends this was because of "communication lapses between national and regional HEW offices." Fed. Resp. Br. 6 n. 9. Its position on exhaustion and primary jurisdiction here is different from its position in *Methodist Hospital of Gary*. The national office of HEW and the Department of Justice, Washington were involved in that case. In *NAACP v. Wilmington Medical Center*, 453 F. Supp. 280, 300 (Del. 1978), still another position was taken: "The Secretary [of HEW] adhering to the position recently taken by the government before the Supreme Court in *Bakke* . . . concedes that a private action may be brought against a recipient of federal assistance under Title VI and Section 504, but contends that the plaintiffs in this case *elected to enforce their rights through the administrative process and therefore are entitled only to judicial review of administrative action.*" (Emphasis added.)

Ms. Cannon had filed an administrative complaint prior to instituting this suit and HEW had completed its on-site investigation. Cert. Pet. A-35. It is apparent that there is another communication lapse, since the HEW brief indicates a lack of awareness of the administrative complaint. HEW contends in its brief here that "the Court need not address itself to the various questions presented when an administrative investigation is under way . . . at the time a Title IX complaint is filed in district court." Fed. Resp. Br. 60 n. 36.

28. The doctrine is more properly that of exhaustion rather than primary jurisdiction since in our view there is no judicial jurisdiction until the administrative procedure is completed. See *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 433 (1939).

III.

THE SUBSEQUENT LEGISLATION AND PRIOR DECISIONS RELIED ON BY PETITIONER DO NOT SUPPORT AN INDEPENDENT PRIVATE RIGHT OF ACTION.

Petitioner claims that congressional intent to provide a private right of action under Title IX "has been affirmed by at least three subsequent declarations of Congress"—Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794; the Age Discrimination Act of 1975, 42 U. S. C. § 6101; and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 Pet. Br. 6-7. Similar contentions with respect to one or more of these statutes are made by the federal respondents and petitioner's *amici*.

Petitioner also argues that prior judicial decisions "expressly had construed Title VI to create a private right of action." Pet. Br. 8.

Although subsequent legislation has little relevance²⁹, petitioner's references do not support her claim. The cases cited by petitioner do not support a Title VI private right of action.

A. The Rehabilitation Act of 1973.

Petitioner refers to "congressional declarations that Title VI and Title IX 'permit a judicial remedy through a private action,' made in connection with amendment of the Rehabilitation Act of 1973 . . ." Pet. Br. 10. The reference is to an addendum to a Senate Report in support of the 1974 amendments to the 1973 Rehabilitation Act. Sen. Rep. No. 93-1297. 1974 U. S. Code Cong. and Ad. News 6390-91.

29. "The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight." *Teamsters v. United States*, 431 U. S. 324, 354 n. 39 (1977); "Legislative observations 10 years after passage of the Act are in no way part of the legislative history." *United Airlines v. McMann*, 434 U. S. 192, 200 n. 7 (1978).

The context in which the quotation from petitioner's brief appears discusses section 504 of the 1973 Act—a section not modified by the proposed 1974 amendments. The full text makes clear that section 504 “was patterned after . . . the anti-discrimination language of section 601 [of Title VI] . . . and section 901 [of Title IX].” The 1973 Act did not include the enforcement procedures of Titles VI and IX, *i.e.*, a provision comparable to sections 602 and 902 of Titles VI and IX. “It [the 1973 Rehabilitation Act] does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form and such regulations and enforcement are intended.” The Report then described the intended, but not included, procedures which it expected HEW to complete. The relevant paragraph concluded with the sentence from which petitioner's quotation is extracted:

This approach to implementation of section 504, which closely follows the models of the above cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action. 1974 U. S. Code Cong. and Ad. News 6391.

The full context makes clear that the judicial remedy referred to had to be a review of administrative action, not an independent private action, otherwise the preceding part of the sentence is meaningless.

That is precisely how this sentence was read in *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277, 1286 (7th Cir. 1977). There the Court quoted the full text from the Senate Report described above, including the final sentence. The Court then observed “. . . the above language contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action. . .” The Court went on to hold that until an administrative procedure was provided—something

the 1973 Rehabilitation Act did not do—it would permit an independent right of action. But after an enforcement procedure is promulgated, “the private cause of action under Section 504 should be limited to *a posteriori* judicial review.” *Id.* at 1286 n. 29.³⁰

We submit that the 1974 Report referred to by petitioner does not support petitioner's claim that it demonstrates congressional intent to provide an independent private right of action under Titles VI and IX.³¹

B. The Age Discrimination Act of The Older Americans Amendments of 1975.

The Act, 42 U. S. C. § 6101, *et seq.* generally prohibits discrimination on the basis of age in federally assisted programs. It contains provisions comparable but not identical to Titles VI and IX. Petitioner refers to a congressional declaration that “legislation patterned on Title VI contemplated a ‘private right to such a remedy through civil suit’ made in connection with the Age Discrimination Act,” citing 1975 U. S. Code Cong. and Ad. News 1324. Pet. Br. 10.

The inner quote which purports to be from the referenced Report is misquoted; the sentence in which it appears has nothing to do with Title VI. The context in which the sentence appears is as follows:

Neither the private right to seek a remedy through civil suit contemplated by the House bill nor the authority of the Attorney General to bring ‘pattern and practice’ actions contained therein is included in the conference substitute; thus implementation will proceed through a set of con-

30. Despite this unequivocal statement in *Lloyd*, petitioner and HEW cite it in support of the proposition that it recognizes a private right of action under the Rehabilitation Act and by analogy under Title IX. Pet. Br. 7 n. 4; Fed. Resp. Br. 38-39.

31. Section 504 has been amended as part of the Comprehensive Rehabilitation Services Amendments of 1978. P. L. 95-602. The amendment makes applicable to section 504 the “remedies, procedures, and rights set forth in Title VI.”

sistent Federal regulations rather than a case by case method in the courts. Conference Report No. 94-670, 1975 U. S. Code Cong. and Ad. News 1324.

We simply do not understand how this supports petitioner's position.³²

C. The Civil Rights Attorney's Fees Awards Act of 1976.

This Act was adopted after the initial decision by the Court of Appeals in this case and its adoption was the reason the Court granted rehearing on the Title IX issue.

The Act, now part of 42 U. S. C. § 1988, provides in part that in any action or proceeding to enforce Title IX, among other statutes, the court may in its discretion allow the prevailing party a reasonable attorney's fee as part of its costs.

This Act, contends petitioner, confirms congressional understanding that Title IX is privately enforceable. Pet. Br. 9.

However, as the opinion of the Court below on rehearing thoroughly explained, the legislative history of the Attorney's Fees Awards Act did not attempt to define which prior legislation provided for a private right of action, but rather to provide

32. The Age Discrimination Act has also been the subject of recent congressional amendment. P. L. 95-478. The House amendments attempted to provide an independent private right of action. H. R. 12255. The purpose was explained: "Because there have been administrative delays in investigating and resolving complaints, giving elderly persons this private judicial right would help in enforcing this important law." 124 Cong. Rec. H3925 (daily ed. May 15, 1978). The Senate bill did not include such a right. In conference it was agreed that "any interested person" could bring an action "to enjoin a violation of this Act," but that no such action could be brought "if administrative remedies have not been exhausted." Conference Report No. 95-1618 to accompany H. R. 12255, 47, 87. This development suggests two observations: when Congress intends a private right of action it knows how to say so clearly; Congress intends that when it establishes an administrative procedure, the procedure should be exhausted before involving the judiciary. The discussion of this Act in the brief for HEW ignores this amendment. Fed. Resp. Br. 40-43.

for fee awards when or if an action should exist. The Act is entirely consistent with the conclusion there is no independent private right of action under Title IX but only the right to a *posteriori* judicial review.

The Court of Appeals noted that its first decision had been brought to the attention of Congress during the debate on the Act on October 1, 1976. The Court quoted (559 F. 2d at 1079-80) the following remarks by Representative Railsback during final debate (122 Cong. Rec. H12161, daily ed., October 1, 1976):

Mr. Railsback. Mr. Speaker, I rise in support of S. 2278 which is designed to allow the court, in its discretion, to award reasonable attorney fees to prevailing parties—other than the United States—in suits to enforce the Civil Rights Acts which Congress has enacted since 1866.

* * * * *

Mr. Speaker, in considering S. 2278 for passage today, I have been alerted to several legal issues which were not raised at hearings held by the Senate and House committees. Not wishing to establish any legal precedents by implication, I would like to make several points explicitly clear with respect to the intent of this bill.

I have been informed by the Committee on Education and Labor as well as several education associations that under title VI of the Civil Rights Act and title IX of the Education Amendments of 1972 there exists a serious question as to whether an individual complainant or class of complainants has the right to sue as a private plaintiff. *To date the Department of Health, Education and Welfare has been the prime enforcer of these titles and in the case of Cannon against University of Chicago, the Seventh Circuit U.S. Court of Appeals stated that Congress gave the right of action to HEW and not to private individuals.*

It has been brought to my attention that by granting attorneys' fees to prevailing parties other than the United States, Congress might implicitly authorize a private right of action under title VI and title IX. This is not the intent of Congress. This bill merely creates a remedy in the event

the courts determine that an individual may sue under these statutes. *This bill does not authorize or statutorily grant any private right of action which does not now exist.* (Emphasis added.)

As the Court below observed, "We doubt that the legislative history could be much clearer." 559 F. 2d at 1080; Cert. Pet. A-27. Certainly, this cannot support an inference that in adopting the Attorney's Fees Awards Act, Congress expressed any opinion as to the intent of the Congress which adopted Title IX six years earlier.

D. Prior Decisions.

Petitioner contends that prior decisions of this Court and lower courts have held that an independent private right of action is cognizable under Title VI, and that these carry over to Title IX.

All the cases cited by petitioner involve public bodies or officials and jurisdiction in each is clear under either the Fifth or Fourteenth amendments.³³ They are no more definitive on the

33. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S. D. Ohio 1976), cited in the *amici* brief of the National Urban League, et al., 13 n. 24, involved private parties. However, there, the "principal thrust" of the plaintiff's case was "redlining" in violation of Title VIII of the Civil Rights Act of 1968—discrimination in the sale of housing. *Id.* at 491. Defendant resisted the claim of the applicability of Title VI not on jurisdictional grounds, but on the theory that "redlining" was not discrimination within the meaning of Title VI.

HEW cites *Hawthorne v. Kenbridge Recreation Association*, 341 F. Supp. 1382 (E. D. Va. 1972) as a case in which a Title VI action was maintained although a suit under 42 U. S. C. § 1983 would not lie because the defendant was a private not-for-profit rural recreation association. Fed. Res. Br. 25. The defendant had received a federally guaranteed loan to build and improve recreational facilities. Membership in the corporation was limited to whites. The suit was by a black plaintiff who applied for membership and had been rejected. The defense was that the loan was an insured loan and therefore specifically exempted under Title VI. The defendant never contested and the court did not discuss the right of the plaintiff to maintain the action. See comments of Justice Stevens in *Bakke*, 98 S.

(Footnote continued on next page)

issue raised here than is *Bakke* itself. In addition, insofar as our research has disclosed, the first time the issue has been directly raised and fully briefed has been in this case.³⁴ Because of the existence of jurisdiction on other grounds the issue has not been critical in these earlier cases. The disposition of the question in the main opinion in *Bakke* is illustrative. "We find it unnecessary to resolve this question in the instant case . . . Similarly, we need not pass upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies." *Bakke*, 98 S. Ct. at 2745.

Lau v. Nichols, 414 U. S. 563 (1973) is petitioner's primary authority. This was a class action on behalf of Chinese-speaking students to compel the San Francisco school district to provide bilingual compensatory education in the English language. Jurisdiction was claimed under 42 U. S. C. § 1983.³⁵ Violation of the Fifth and Fourteenth Amendments, the California Constitution and Title VI were alleged. The district court and court of appeals held there was no constitutional or statutory violation. 483 F. 2d 791 (9th Cir. 1973).

In the opinion for the majority, Justice Douglas stated that "We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964 . . . to reverse the Court of Appeals." 414 U. S. at 566.

(Footnote continued from preceding page.)

Ct. at 2814: "Because petitioner questions the availability of a private cause of action for the first time in this Court, the question is not properly before us."

34. Since the decision in the Court of Appeals in this case, the issue of independent private action has been briefed in the supplemental briefs in *Bakke* and in *NAACP v. Wilmington Medical Center*, 453 F. Supp. 280, 296 (D. Del. 1978). In the latter case the court concluded: "The legislative history, moreover, confirms that Congress intended to accord aggrieved persons a right to post-administrative remedy judicial review under the APA, as contradistinct from an independent and *de novo* proceeding in the federal courts."

35. The jurisdictional statement is set out in the opinion on rehearing of the Court of Appeals in this case. 559 F. 2d at 1083 n. 7; Cert. Pet. A-34, n. 7.

There were two concurring opinions. That of Justice Stewart emphasized the HEW directive specifically requiring bilingual programs "where inability to speak and understand English language excludes national origin-minority group children from effective participation in the educational program." 35 Fed. Reg. 11595. ". . . [I]t is not entirely clear that § 601 . . . standing alone, would render illegal the expenditure of federal funds on these schools." *Id.* at 570.

The concurring opinion of Justice Blackmun cautioned "against the possibility that the Court's judgment may be interpreted too broadly," and emphasized that the case dealt with a large number of students—about 1,800. "For me, numbers are the heart of this case and my concurrence is to be understood accordingly." *Id.* at 571-72.

There are major differences between *Lau* and the present case. One difference is that unlike here, HEW had issued a clear directive on the subject involved.

The critical distinction is that jurisdiction against the public school system was clear under § 1983, and the question of whether Title VI alone confers jurisdiction was neither raised nor argued. This was pointed out by the Court of Appeals: "A review of the briefs filed in the Supreme Court reveals that the parties presented no jurisdictional issues to the Court." The Court concluded that "because plaintiffs' cause of action in *Lau* arose under 42 U. S. C. § 1983, *Lau* simply cannot be read as supporting the proposition that private parties have an implied cause of action under Title VI. . . . [P]laintiff at bar . . . is unable to invoke 42 U. S. C. § 1983 because she is suing private universities acting under color of no state law." 559 F. 2d at 1083; Cert. Pet. A-34.

Petitioner also cites three court of appeals decisions which "expressly had construed Title VI to create a private cause of action." Pet. Br. 8. We disagree with plaintiff's reading of these cases.

The first of these is *Bossier Parish School Board v. Lemon*, 370 F. 2d 847 (5th Cir.), cert. denied 388 U. S. 911 (1967).

It is representative of a line of cases dealing with attempts to avoid the impact of *Brown v. Board of Education*, 349 U. S. 294 (1955). The case involved a "new and bizarre excuse" to "rationalize [the] denial of the constitutional right of Negro school children to equal educational opportunities with white children." 370 F. 2d at 849. The suit was against a public school board claiming discrimination against Negro children of members of the armed services stationed at Barksdale Air Force Base. Although the Court did discuss Title VI, it is clear that the decision was bottomed on constitutional grounds: "The key point is that here individuals are suing to enforce a national constitutional right." 370 F. 2d at 851. There was no jurisdictional issue in *Bossier* and it hardly represents support for a private action under Title VI absent constitutional grounds.

Kelley v. Altheimer Arkansas Public School District, 378 F. 2d 483, 485 (8th Cir. 1967), another of petitioner's authorities, was a "class action suit in equity pursuant to Title 42, U. S. C. § 1983." This case cannot be read as supporting the proposition, even by implication, that Title VI permits private actions. *Kelley* was a public school desegregation case brought only under 42 U. S. C. § 1983, and its jurisdictional counterpart, 28 U. S. C. § 1343. Both the questions of liability and relief were measured by traditional equal protection standards. Title VI was discussed only for the purpose of rebutting the argument that HEW's approval of the Altheimer School District's voluntary plan of desegregation, which had been submitted in response to HEW regulations under Title VI, did not exonerate the defendant from judicially-determined constitutional violations.

In *Cypress v. Newport News General and Nonsectarian Hospital Association*, 375 F. 2d 648 (4th Cir. 1967), the third case cited by petitioner, the court described the jurisdictional basis: "Plaintiffs rely upon 42 U. S. C. §§ 1981 and 1983 and the Fifth and Fourteenth Amendments." at 651 n. 1. *Cypress* involved racially discriminatory practices of a partially govern-

ment-funded hospital.³⁶ Title VI was discussed only for the purpose of determining the appropriate relief to be granted. The hospital argued that HEW's determination that the hospital was in compliance with Title VI principles obviated the necessity for injunctive relief. The Court of Appeals rejected this argument because of its concern that HEW certification was an "undependable means of effectuating the plainly established constitutional rights of the plaintiffs." 375 F. 2d at 660.

None of these cases "expressly . . . construed Title VI to create a private cause of action," as petitioner claims. Pet. Br. 8. In fact, none considered the question.³⁷

36. This case is probably no longer valid authority for a constitutional claim under § 1983 since *Moose Lodge v. Irvis*, 407 U. S. 163 (1972). See *Doe v. Bellin Memorial Hospital*, 479 F. 2d 756 (7th Cir. 1973).

37. *Amici* cite a total of twelve additional cases. All are subject to the same distinctions noted in the cases discussed above. Exemplary is *Uzzell v. Friday*, 547 F. 2d 801 (4th Cir. 1977), opinion on rehearing en banc 558 F. 2d 727 (1977) vacated and remanded 98 S. Ct. 3139 (1978). *Uzzell* involved racially discriminatory practices at the University of North Carolina, which plaintiffs "assailed as contravening the Fourteenth Amendment, the Civil Rights Act of 1871, 42 U. S. C. § 1983, and the Civil Rights Act of 1964, Title VI, 42 U. S. C. § 2000d." *Id.* at 802 (footnote omitted). With neither discussion nor citation of authority, the Court of Appeals noted that "jurisdiction is afforded here by 28 U. S. C. §§ 1331 and 1343. . . ." *Id.* at 802 n. 3. The court's conclusion that the assailed practices entitled the plaintiffs to relief rested on the premise that both the Constitution and the statutes had been violated. *Id.* at 804. Once again, the question of private enforceability of Title VI was not addressed by the court.

HEW argues that since there were a number of cases indicating "judicial approval of private litigation" under Title VI at the time Title IX was adopted, this is "persuasive evidence that [Congress] expected private suits to be permitted under Title IX." Fed. Resp. Br. 31-32. There is not a single reference in the legislative history of Title IX to a court case purporting to manifest such "judicial approval." As the Court of Appeals observed in this case:

First of all, we do not read those decisions as affirmatively establishing the existence of an implied private right of action under Title VI at the time Title IX was enacted. More important, there is nothing in the legislative history of Title IX itself indicating that Congress was even aware of those decisions, let alone intended to adopt their construction of Title VI.

559 F. 2d at 1081-82; Cert. Pet. A-31.

CONCLUSION.

The plain terms of Titles VI and IX and their legislative history clearly show a congressional intent not to establish an independent private right of action. The subsequent legislative enactments and prior decisions relied on by petitioner and the federal respondents do not detract from that conclusion.

The legislative history shows beyond question that the procedures under section 602 of Title VI and section 902 of Title IX were to be the means of enforcement. A private right of action independent of the enforcement procedures would frustrate the clearly expressed congressional intent to provide a "reasonable, moderate, cautious, carefully worked out solution to a situation that clearly calls for legislative action." Sen. Humphrey, 110 Cong. Rec. 6544.

HEW contends that private enforcement "poses no threat to the stability of federally funded education programs or to the efficacy of administrative enforcement measures." Fed. Resp. Br. 52.

We do not follow the argument. Even assuming that a court could require the admission of a claimant such as petitioner which we believe it could not do under the remedy directed in *Rosado v. Wyman*, 397 U. S. 397 (1970)³⁸—the efficacy of the administrative process would necessarily be compromised. If a court should decide in an independent private action that there had been discrimination under Title IX, the administrative agency is either bound by that decision, in which event the administrative procedures are clearly bypassed, or it may act independent of the judiciary and thus have the capability for deciding contrary to the court. In the event of judicial review of that decision, the court may be required to uphold the agency

38. See *supra* n. 11.

action under the Administrative Procedure Act standard of review even though the court may have decided the discrimination question the other way through the independent private action.

Despite its claim that a private action poses no threat to the efficacy of administrative enforcement measures, HEW elsewhere appears to recognize the validity of Justice White's observation in *Bakke* that a private right of action would "jeopardize the administrative processes so carefully structured into the law." *Bakke*, 98 S. Ct. at 2798. HEW, in a disarmingly frank statement, concedes that it will act here only if the Court decides petitioner has no independent private right of action:

If petitioner does not prevail in her contention that Title IX creates a private right of action, the federal respondents will, of course, *fulfill their responsibility* under applicable regulations to conduct an administrative investigation of petitioner's charges against the University of Chicago and Northwestern University. Fed. Resp. Br. 54 n. 33. (Emphasis added.)

One wonders why HEW has not acted to fulfill its responsibility to complete its investigation of the Cannon complaint filed with it months before this litigation started if indeed there is no conflict between an independent private right of action and the administrative process.

Perhaps the answer lies in Justice Black's admonition in *Rosado v. Wyman*, 397 U. S. 397, 434 (1970):

And in instances when HEW is confronted with a particularly sensitive question, the agency might be delighted to be able to pass on to the courts its statutory responsibility to decide the question.

The issues raised by the Cannon administrative complaints are acknowledged by HEW to be "of first impression and national in scope." It told her that "national . . . policy must be developed." It completed its on-site investigations by June 1976. It assured her at that time it would "move as expeditiously as possible." Cert. Pet. A-35. It has not been heard from since,

except through briefs in this litigation arguing first why it had exclusive jurisdiction and then why it did not.

Petitioner's remedy lies against HEW under her alternative claim for relief before this Court.³⁹ Pet. Br. 20. "To hold otherwise would be to permit the defendants [HEW] to avoid their statutory duty by simply failing to conclude the investigatory process." *Brown v. Weinberger*, 417 F. Supp. 1215, 1221 (D. D. C. 1976). See also, *Adams v. Richardson*, 480 F. 2d 1159 (D. C. Cir. 1973) (*en banc*).

We respectfully request that the decision of the Court below holding there is no independent private right of action under Title IX be affirmed.

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39. HEW points out that the petition for a writ of certiorari did not raise the question of the propriety of the Court of Appeals ruling on petitioner's alternate claim for relief against HEW under the Administrative Procedure Act, 5 U. S. C. § 706 to "compel agency action unlawfully withheld or unreasonably delayed." Fed. Resp. Br. 54 n. 33. The Court of Appeals denied the claim "since HEW is actively investigating plaintiff's complaint and the delay involved of about one year has not been unreasonable." 559 F. 2d at 1077; Cert. Pet. A-20. This opinion was issued in August 1976, shortly after HEW advised petitioner that it had completed the "on-site portion of the investigations". Cert. Pet. A-35. HEW now admits it is not actively investigating her complaints, which have now been pending before the agency for over three and one-half years. Whether or not the question is properly before the Court on the certiorari petition, petitioner would now appear to have a valid claim against HEW under 5 U.S.C. § 706.

APPENDIX.

**TITLE IX, EDUCATION AMENDMENTS
OF 1972**

20 U. S. C.—

**§ 1681 [§ 901]. Sex—Prohibition against discrimination;
exceptions.**

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

* * * * *

§ 1682 [§ 902]. Federal administrative enforcement; report to congressional committees.

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has

been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 1683 [§ 903]. Judicial review.

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title.

**TITLE VI OF THE CIVIL RIGHTS ACT
OF 1964**

42 U. S. C.—

§ 2000d [§ 601]. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ 2000d-1 [§ 602]. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has

been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 2000d-2 [§ 603]. Judicial review; Administrative Procedure Act

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

No. 77-926

Supreme Court, U. S.
FILED

JAN 2 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

GERALDINE G. CANNON, PETITIONER

v.

THE UNIVERSITY OF CHICAGO, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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REPLY BRIEF FOR THE FEDERAL RESPONDENTS

1. The private respondents argue that this Court should not recognize an implied private right of action under Title IX of the Education Amendments of 1972 because to do so would be to involve federal courts improperly in the admissions process at private graduate and professional schools (Resp. Br. 6, 13-16).¹ They assert that acceptance of petitioner's position in this case would force such schools to base their admissions decisions "solely on quantifiable factors such as test scores" (*id.* at 6). We disagree. Nothing in the position advocated by petitioner and the federal respondents justifies the private respondents' purported fears. The spectre of trial judge as admissions officer, infringing the academic freedom of private universities (*id.* at 13, 15-16), is a baseless fear.

¹"Resp. Br." refers to the joint brief of the private respondents. When the meaning is clear from the context, the private respondents will sometimes be referred to simply as "respondents." The abbreviation "Br." will be used to refer to the principal brief of the federal respondents.

If petitioner prevails in this lawsuit, the victims of sex discrimination in federally funded education programs will be able to seek redress for their injuries in federal court.² The courts' task in cases like this is not, as respondents suggest, to choose among hundreds of qualified applicants and decide which should be admitted to graduate and professional schools around the country. The courts' task is not to review the numerous factors considered by admissions committees and decide the appropriate weight to be assigned to each. If the judgment of the court of appeals in the present case is reversed, the University of Chicago Pritzker School of Medicine will remain free to make its admissions decisions "on the basis of the ability, achievement, personality, character, and motivation of the candidates" (Resp. Br. 13).³ The Pritzker School and other medical schools will not be deterred from making their final selections by reference to such personal qualities as "[h]onesty, intellectual curiosity, imagination, cooperativeness, friendliness, and a willingness to work long hours" (*id.* at 14). Indeed, no change in the admissions process at respondent schools will be required by the decision in this case.

²The private respondents' brief contains language characterizing the question presented here as a jurisdictional one. See Resp. Br. 3-5, 46-47. This is incorrect. *Bell v. Hood*, 327 U.S. 678, 682 (1946), held that, when a complaint asserts a claim arising under the Constitution or laws of the United States, federal courts do have jurisdiction to decide whether the complaint states a cause of action on which relief can be granted. The question whether a particular statute provides a private right of action is substantive, not jurisdictional. As the Court's opinion in *Bell* plainly stated, "[i]f the court * * * determine[s] that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction" (*ibid.*).

³Although the private respondents acknowledge that the merits of petitioner's sex discrimination claims are not at issue in this Court (Resp. Br. 11), they devote substantial energy to an attempt to show

Title IX prohibits sex discrimination in admissions to federally funded graduate and professional schools. This point is undisputed. Whatever the result here, the private respondent will not be permitted to discriminate on the basis of sex in choosing their medical students, so long as respondent schools continue to receive federal funds. The only question presented here is whether federal courts may provide relief to the victims of sex discrimination that violates Title IX. If that question is answered affirmatively, courts in cases like this will ask only whether the decision to reject a particular applicant was the product of illegal sex discrimination. If the decision was based on other factors, the defendant school will prevail, and it will not matter what the other factors were. If, on the other hand, the plaintiff applicant was rejected on the basis of sex, the court will order an appropriate remedy and the policy underlying Title IX will be vindicated.⁴

that petitioner was properly denied admission to the University of Chicago medical school (*id.* at 6, 10-11 & n.5). Petitioner's personal qualifications are, of course, irrelevant to the question here presented. The issue is not whether petitioner suffered discrimination but whether she is entitled to have the matter resolved in federal court.

⁴The private respondents seem to argue (Resp. Br. 15 n.11) that, even if Title IX does create a private cause of action, federal courts may not award injunctive relief for past discrimination if the recipient of federal funds responsible for the discrimination decides to forego further federal aid. This cannot be the case. When educational institutions accept federal financial assistance, they agree to comply with a variety of antidiscrimination provisions, including Title VI of the Civil Rights Act of 1964, Title V of the Rehabilitation Act of 1973, and Title IX. If they nevertheless discriminate in violation of one or more of these statutes during the period when they are receiving federal funds, they should not be permitted to escape all consequences of that discrimination by the simple expedient of refusing further aid. To hold otherwise would be to sanction the use of at least some federal monies in a discriminatory manner—precisely the result Congress sought to eliminate by enacting Title IX, Title VI, and Title V. In any event, the Court need not now resolve the question of what remedies would be available in a private suit

2. a. The private respondents make two arguments based on the so-called "doctrine of exhaustion of administrative remedies" (Resp. Br. 33-38). They maintain first that "no judicial intervention would be appropriate until * * * [the Department of Health, Education, and Welfare] has completed its investigation and review functions under Section[] * * * 902" (*id.* at 33). Although this contention has been answered in the main brief for the federal respondents (Br. 58 n.36), a few additional remarks may be helpful.

Exhaustion of administrative remedies is ordinarily a prerequisite to review of agency action. See *Green Street Association v. Daley*, 373 F. 2d 1, 8-9 (7th Cir.), cert. denied, 387 U.S. 932 (1967). This general rule follows from the recognition that, until available administrative procedures have been used, an agency decision is not final for purposes of judicial review.⁵ As the present case comes to this Court, however, petitioner does not seek review of agency action. Rather, she seeks direct relief from the allegedly discriminatory conduct of respondent medical schools.

Of course, Congress may create an administrative scheme for the handling of certain kinds of complaints against private parties and, in some such circumstances, may provide that complainants should resort to the administrative process before invoking the aid of the courts. This sort of "exhaustion" requirement is wholly different from that described above. Under statutes of the kind discussed here, "exhaustion" is necessary not because

under Title IX. Neither the district court nor the court of appeals addressed that question, and it is properly left for initial consideration on remand.

⁵Where it is clear that an agency decision is final even though available procedures have not been used, courts may undertake review without requiring formal exhaustion. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976).

it is a logical precursor to final agency action, but because Congress has decided that courts should not be asked to resolve certain disputes until the appropriate administrative body has had a chance to do so. "Exhaustion" in this sense is a statutorily prescribed jurisdictional prerequisite to certain kinds of litigation. The critical point in this connection is that when Congress decides to establish such jurisdictional prerequisites, it does so explicitly. Title II and Title VII of the Civil Rights Act of 1964 are typical examples. Both require some form of resort to available state and local enforcement schemes before a federal civil action may be filed. Title VII also requires the filing of a charge with the Equal Employment Opportunity Commission as a prerequisite to federal litigation.⁶ See Br. 27 n.19. Another example of this kind of statute is Title III of the Older Americans Amendments of 1975, as amended by Section 401(c) of the recent Comprehensive Older Americans Act Amendments of 1978, Pub. L. No. 95-478, 92 Stat. 1555-1556. (The recent amendments are discussed at page 13, *infra*.)

By contrast, in Title IX of the Education Amendments of 1972, Congress did not require resort to the administrative process as a precondition to lawsuits challenging alleged sex discrimination by private recipients of federal funds. Moreover, the administrative procedure that Congress did provide in Section 902 of the

⁶Even if the EEOC promptly takes final action on an employment discrimination charge, the complainant is entitled to *de novo* consideration of his Title VII claim in a subsequent civil action. *Chandler v. Roudebush*, 425 U.S. 840, 844-845 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-799 (1973). The availability of this kind of judicial remedy underscores the difference between exhaustion as a logical precondition to final agency action (typically reviewed under a "substantial evidence" or "arbitrary and capricious" standard) and compulsory resort to the administrative process as a jurisdictional prerequisite to a federal civil action (frequently involving *de novo* fact finding).

Amendments, 20 U.S.C. 1682, does not even contemplate the participation of complaining victims of alleged illegal discrimination or the administrative award of individual relief to redress injuries suffered as the result of such discrimination. It should be plain, therefore, that Congress did not intend to require resort to the administrative procedure as a prerequisite to private suits under Title IX.

The main thrust of the private respondents' brief, of course, is not that the administrative procedure in Section 902 of the Amendments must be "exhausted" before private recipients of federal funds may be sued, but that such recipients may not be sued at all by the victims of sex discrimination, in violation of Title IX. Respondents' primary argument concerns not the exhaustion of administrative remedies, but rather the exclusivity of such remedies. As the principal brief for the federal respondents argues (Br. 49-51), however, the administrative mechanism in Section 902 should not be regarded as the sole means of enforcing the broad guarantee set forth in Section 901. The administrative fund termination procedure is not an exclusive remedy because it is not designed to ameliorate injury suffered by the individual victims of discrimination. As a practical matter, HEW cannot hope to police all federally funded education programs, and even if administrative enforcement were always feasible, it often might not redress individual injuries. An implied private right of action is necessary to ensure that the fundamental purpose of Title IX, the elimination of sex discrimination in federally funded education programs, is achieved.

b. The private respondents' second "exhaustion" argument is more properly termed a "primary jurisdiction" theory. Respondents contend that there should be no private litigation under Title IX until HEW has developed a "national policy" for the statute's implementation. They assert that petitioner's complaint in the

present lawsuit "illustrates * * * the inappropriateness of a case-by-case approach" (Resp. Br. 35). This argument is both incorrect and disingenuous. It is disingenuous because it suggests that the private respondents would be willing to countenance private litigation under Title IX if HEW would first issue uniform standards for the statute's enforcement. This is inconsistent with respondents' basic contention that Title IX provides *no* private right of action whatever. The private respondents have not asserted that the district court erred in failing to stay petitioner's suit while HEW completed action on her administrative grievance. Rather they have argued that the district court acted correctly in dismissing the complaint for failure to state a claim on which relief could be granted. This position is far more drastic than a simple plea for a uniform, administratively developed national policy. Respondents would preclude private litigation altogether; they would not merely postpone private suits so that courts could have the benefit of prior administrative action.

Respondents' primary jurisdiction argument is not only irreconcilable with their fundamental contention in this case but it ignores the role of Title IX itself as a declaration of national policy. Congress, not HEW, has decided to prohibit sex discrimination in federally funded education programs. Courts are perfectly capable of enforcing that prohibition, just as they routinely enforce other antidiscrimination provisions. Respondents insist that case-by-case adjudication of Title IX complaints is inappropriate, but their argument disregards the fact that administrative consideration of individual complaints under Section 902 inevitably proceeds on a case-by-case basis, as does the judicial review of agency action for which Section 903 provides.

Moreover, the administrative and judicial handling of Title IX grievances need not be mutually exclusive processes. If, in a private action under Title IX, a proper

need arises for the court to ascertain the views of the funding agency on the events in question, it may stay its hand until an already pending administrative investigation is completed or until the plaintiff in the private suit has filed an administrative complaint and the agency has acted on it. Likewise, when a private suit is filed after substantial progress has been made in the administrative handling of an earlier complaint to the agency based on the same subject matter, the agency may ask the court to defer action in order to afford the administrative process an opportunity to produce a satisfactory solution. This is precisely what occurred in *Terry v. Methodist Hospital of Gary*, Civ. No. 76-373 (N.D. Ind.), a case that the private respondents incorrectly characterize as inconsistent with the position taken in the federal respondents' main brief. Here, petitioner's complaint was dismissed because the district court believed that Title IX did not create a private right of action. This was not a question that HEW could hope to resolve administratively, and accordingly further administrative action on petitioner's complaint was postponed pending the outcome of this suit. By contrast, in *Terry* a private Title VI suit challenged the alleged discriminatory effect of a federally financed hospital relocation in Gary, Indiana. Some time after the complaint in *Terry* was filed, HEW decided to review the entire hospital situation in the Gary community, in response to an earlier administrative complaint from another party. The agency therefore asked the court to defer proceedings in the civil suit until administrative compliance efforts could be completed. The court refused, but a settlement acceptable to all parties was nevertheless concluded before the court rendered any decision on the merits in the private action.

The agency's position in *Terry* was consistent with that adopted by the federal respondents here. The federal respondents' principal brief stated that "the Court need

not reach the question whether it might be appropriate in some situations for a district court to defer action on a private Title IX complaint pending completion of an ongoing administrative investigation or pending the outcome of informal negotiations directed toward achieving voluntary compliance with Title IX" (Br. 60 n.36). This statement is correct, because the private respondents urged the district court to dismiss petitioner's complaint and the district court did so. As it now stands, this case does not present the question whether the district court should have stayed proceedings in petitioner's lawsuit until HEW completed its administrative investigation. The only issue for decision is whether Title IX authorizes private actions in the first place. Although the private respondents assert that "[t]here is considerable confusion in HEW's position" (Resp. Br. 38 n.27), they have not identified any material respect in which the agency's arguments here differ from those previously advanced in other cases.⁷

⁷In addition to *Terry*, the private respondents cite *NAACP v. Wilmington Medical Center, Inc.*, 453 F. Supp. 280 (D. Del. 1978), appeal pending, Nos. 78-1616 and 78-1943 (3d Cir), as a case that reveals inconsistencies in HEW's arguments. A review of the issues raised in *Wilmington* and the litigating position taken by the government there demonstrates that the private respondent's charge is unsupported.

The complex history of the *Wilmington* litigation is fully described in HEW's brief on appeal to the Third Circuit, a copy of which has been lodged with the Clerk of this Court. The case involves a challenge to the relocation of part of the Wilmington Medical Center hospital facilities. Minority and handicapped residents of Wilmington, Delaware alleged that the move of a federally funded facility from an inner city location to a suburban site discriminated on the basis of race and handicap, in violation of Title VI of the Civil Rights Act and Title V of the Rehabilitation Act. After a lengthy investigation, HEW entered into a voluntary compliance agreement with the medical center, approving the relocation but imposing certain conditions designed to guarantee minority and handicapped pa-

3. Yale University, in its brief as amicus curiae in support of the private respondents, contends that no private right of action is properly implied under Title IX, because that statute represents an exercise of Congress' spending power, rather than one of its enumerated powers to legislate in particular substantive areas. Yale begins with the premise that under the spending power Congress may impose conditions on the receipt of federal funds and

tients ready access to the relocated facilities. This agreement was concluded after plaintiffs had filed their civil action against HEW and the medical center in district court.

HEW steadfastly maintained that Title VI and Title V do authorize private suits against recipients of federal funds. Although the agency's position on this point remained constant after the voluntary compliance agreement was reached, HEW did not clearly inform the district court of its view concerning the proper relationship between judicial review of final agency action and private suits against recipients of federal funds. This failure led to the statement in the district court's opinion that the private respondents now stress (453 F. Supp. at 300; Resp. Br. 38 n.27). In its brief on appeal in *Wilmington*, HEW has argued that plaintiffs should have been required to choose between judicial review of final agency action (i.e., the compliance agreement) under standards provided by the Administrative Procedure Act and a *de novo* proceeding in the district court on the Title VI and Title V complaint against the recipient medical center. See HEW Br. on Appeal at 35-43. HEW has contended that such a choice is necessary in order to avoid the wasteful and anomalous situation in which a court is forced to review the same underlying facts under two different standards. Whatever the merits of this argument, it is not inconsistent with the position taken by the federal respondents in the present case. In *Wilmington*, as here, HEW defended the existence of a private right of action under federal antidiscrimination provisions. Because the agency in *Wilmington* reached a voluntary compliance agreement before the end of litigation, it needed to state its view concerning the proper relationship between review of agency action and private suits against recipients of federal funds. Because no such final agency action has occurred here, the federal respondents simply observed in their principal brief that "[t]his case does not require the Court to determine the proper relationship between administrative and judicial proceedings in every conceivable set of circumstances that may arise under Title IX" (Br. 60 n.36). That observation remains accurate.

may thereby regulate certain activities not otherwise within the reach of the national legislative power. Because the spending power thus extends the potential scope of federal control, Yale argues, courts should be particularly reluctant to recognize implied private rights of action under spending power statutes.

It is not clear how or why this conclusion follows from the breadth of the congressional power to spend for the general welfare. Spending power statutes, like other federal laws, are passed in the expectation that they will be enforced, assuming they are constitutionally valid. Yale has not explained why judicial rather than administrative enforcement of spending power laws is likely to result in an undue expansion of federal authority. If anything, one might suppose that there would be a greater danger of such overreaching if the executive branch, through its funding agencies, were charged with the exclusive responsibility for Title IX enforcement, subject only to a limited judicial review.

Furthermore, although the Yale brief correctly characterizes *Rosado v. Wyman*, 397 U.S. 397 (1970), as a Supremacy Clause decision in which the cause of action was provided by 42 U.S.C. 1983 (Yale Br. 8 n.5), the fact remains that this Court there did entertain a private suit to enforce the provisions of a spending power statute, despite Congress' express provision of a detailed administrative enforcement scheme to ensure the compliance of state AFDC plans with federal requirements (Br. 56). Section 1983 provided the cause of action because the alleged constitutional and statutory violation occurred under color of state law. Likewise, Section 1983 would provide a cause of action for the enforcement of Title IX where the alleged illegal sex discrimination occurred under color of state law (Br. 57). The critical point to be derived from *Rosado* in connection with the argument raised in Yale's amicus brief is that the Court

there sanctioned enforcement of a spending power statute in a private suit, without fear of any unreasonable repercussions for the proper functioning of the federal system. This Court's decisions provide no reason to believe that recognition of an implied private right of action under Title IX would produce an accretion in federal power, and Yale itself has not explained why this should be the expected result.⁸

4. Finally, we reply briefly to three points made by the private respondents concerning statutes other than Title IX that bear on the proper resolution of the question presented in this case.

a. First, and most important, the 1978 amendments to Title III of the Older Americans Amendments of 1975 confirm the congressional understanding that private suits may be used to enforce antidiscrimination provisions unless Congress has explicitly stated a contrary intention.⁹ Although the private respondents suggest that the 1978

⁸Yale also asserts that the federal respondents "have misconstrued the current posture" of the lawsuit pending against the university in the United States District Court for the District of Connecticut (Yale Br. 12 n. 16). The ruling cited in the federal respondents brief (Br. 18 n. 13, 57) was issued in December 1977 by a federal magistrate and subsequently endorsed by the district court. Although the claims of five plaintiffs were dismissed, the magistrate's ruling clearly reveals an inclination to permit private suits under Title IX. More important, any possible misconstruction of the magistrate's ruling has been rectified by the district court's recent decision denying Yale's motion to dismiss the complaint of the remaining plaintiff. *Price v. Yale University*, Civ. No. N-77-277 (D. Conn. Dec. 6, 1978). The court held that "a private right of action under Title IX may, and, in light of the testimony developed at the hearing before this court, must, be implied in the circumstances of this case" (slip op. 23).

⁹Such explicit intent to preclude all but the specified administrative remedy appears, for example, in Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), discussed in *Amalgamated Utility Workers (C.I.O.) v. Consolidated Edison Co. of New York*, 309 U.S. 261, 264-265 (1940). The private respondents' reliance on that case (Resp. Br. 19) is therefore misplaced.

amendments provide support for their position on Title IX (Resp. Br. 42 n.32), the wording of the new law reflects Congress' recognition that antidiscrimination statutes need not contain express authorizing language in order to create a private right of action. See *Cort v. Ash*, 422 U.S. 66, 82 (1975).

Title III of the Older Americans Amendments of 1975, 42 U.S.C. 6101, *et seq.*, prohibits age discrimination in federally funded programs. The statute originally provided that the prohibition should be enforced exclusively through the administrative process. The statute and its legislative history are discussed in some detail in the main brief for the federal respondents (Br. 40-43). In 1978, Congress concluded that administrative delay in investigating and resolving complaints under Title III made it desirable to eliminate the exclusivity provision and to permit enforcement through private litigation. The task was accomplished by replacing the exclusive remedies provision, Section 305(e), 42 U.S.C. 6104(e), with the following provision (92 Stat. 1555):

When any interested person brings an action in * * * district court * * * to enjoin a violation of this Act by any program or activity receiving Federal financial assistance, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health, Education and Welfare, the Attorney General of the United States, and the person against whom the action is directed. * * *

The critical feature of this new Section 305(e)(1) is that it does not in terms establish a private right of action, but only prescribes the notice requirement that must be met by a person who intends to file a private suit. Congress' choice of language indicates that deletion of the exclusive remedies provision alone would have sufficed to permit private suits, but that specific mention of such actions was

necessary in order to permit the addition of the notice qualification.¹⁰ The 1978 amendments thus support implication of a private right of action under Title IX, which has never contained any provision stating that the administrative fund termination procedure in Section 902 is the exclusive remedy for illegal sex discrimination in federally funded education programs.

b. The private respondents take issue with the contention that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, creates a private right of action (Resp. Br. 34, 39-41). In particular, they criticize the citation of *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977), in support of that proposition. The court of appeals in *Lloyd* permitted a private suit to proceed under Section 504, but it indicated that a different result might be expected after the issuance of HEW regulations establishing an administrative enforcement scheme like that provided in Section 902 of the Education Amendments (548 F. 2d at 1285-1288; Br. 39). It should be observed that *Lloyd* was decided by the court of appeals after the panel's first opinion in the present case. Although this case was pending on rehearing when *Lloyd* was decided, the *Lloyd* panel undoubtedly considered itself bound to some extent by the earlier ruling here. Moreover, the private respondents cannot

¹⁰The new Section 305(e)(2)(B) imposes a further prerequisite for private actions under Title III. The statute provides that no such action shall be brought "if administrative remedies have not been exhausted." In order to avoid the possibility of excessive administrative delay before a Title III suit may be filed, the new Section 305(f), 92 Stat. 1556, states that

administrative remedies shall be deemed exhausted upon the expiration of 180 days from the filing of an administrative complaint during which time the Federal department or agency makes no finding with regard to the complaint, or upon the day that the Federal department or agency issues a finding in favor of the recipient of financial assistance, whichever occurs first.

and do not even attempt to explain away the other cases cited in support of private suits under Section 504 (Br. 38).

In addition, the legislative history of the most recent amendments to Title V corroborates Congress' understanding that Section 504 does authorize private suits. The private respondents note (Resp. Br. 41 n. 31) that a new Section 505(a)(2) has been added to Title V to make "[t]he remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 * * * available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under Section 504 of this Act." Rehabilitation Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2983. Respondents fail to note, however, the addition of Section 505(b), which states (92 Stat. 2983):

In any action or proceeding to enforce or change a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Senate committee report accompanying this provision leaves no doubt that Congress contemplates enforcement of Section 504 through private suits. See S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978). The report states (*ibid.*):

The committee believes that the rights extended to handicapped individuals under title V * * * are, and will remain, in need of constant vigilance by handicapped individuals to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.

c. In aid of their argument that Title IX does not create a private right of action, the private respondents point to Section 906 of the Education Amendments of 1972 (Resp. Br. 29-31). At the same time that Section 901 of the Amendments prohibited sex discrimination in federally funded education programs, Section 906 amended Titles IV and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6 and 2000h-2, to permit the Attorney General to initiate suit against public colleges that deny admission on the basis of sex and to intervene in any action in federal court "seeking relief from the denial of equal protection of the laws * * * on account of * * * sex." As originally enacted, Title IV of the Civil Rights Act authorized suit by the Attorney General against any public college that denies admission on the basis of race, color, religion, or national origin; likewise, Title IX of the Act authorized the Attorney General's intervention in federal actions raising equal protection claims based on race, color, religion, or national origin. Section 906 of the Education Amendments simply added sex to this list of personal characteristics. As the legislative history cited by the private respondents shows, Section 906 was designed to close "loopholes" in the 1964 Civil Rights Act and to make Title IV and Title IX of the Act parallel the new prohibition on sex discrimination in federally funded education programs, just as Titles IV and IX had previously followed Title VI's prohibition on race discrimination in federally funded programs. See 118 Cong. Rec. 5808 (1972) (remarks of Senator Bayh). In short, Congress enacted Section 906 to make conforming amendments in Title IV and Title IX of the Civil Rights Act, not to indicate any intention to bar private suits under Title IX of the Education Amendments.¹¹

¹¹Title IV and Title IX authorize suit and intervention by the Attorney General without regard for whether the discriminating public college or the defendant in an equal protection suit receives federal funds. In addition, the Attorney General may sue under Title

CONCLUSION

For these reasons, as well as the reasons set forth in the opening brief for the federal respondents, the judgment of the court of appeals should be reversed and the case remanded for further proceedings under Title IX.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

IV or intervene under Title IX without engaging in any of the voluntary compliance efforts prescribed by Title VI of the Civil Rights Act or Title IX of the Education Amendments. These distinctions provide further evidence that Section 906 should not be read as an implicit statement of congressional intent concerning the permissibility of private suits as a means of enforcing Title IX's prohibition on sex discrimination in federally funded education programs.

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

October Term, 1978

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Reply Brief of Petitioner

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Reply Brief of Petitioner

This reply is directed to the Joint Brief of Respondents The University of Chicago and Northwestern University.

The federal respondents support petitioner. Accordingly, no reply to the federal respondents is necessary, except to note disagreement with their limitation of the question presented. (Fed. Br. p. 54 n. 33). The schools' brief recognized that their argument is dependent upon the validity of petitioner's alternate claim against the federal respondents. (Jt.Br. pp. 9, 12, 50-51).

SUMMARY OF ARGUMENT

The schools' argument rests on five basic premises. None is sound.

I

First, the schools claim that elimination of an admission policy which excludes applicants to federally assisted medical schools on the basis of race or gender either interferes with academic freedom or could be more expertly accomplished by HEW than a federal court. (Jt.Br. pp. 6, 10-16). The first alternative misconceives the nature of the freedom necessary for academic institutions to pursue academic matters on academic grounds. The second alternative overlooks that the procedures required by this Court to eliminate the impact of such illegal discrimination upon an individual are uniquely judicial. Agency implementation necessarily would require judicial intervention to provide specifically enforceable injunctive relief pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Jurinko v. Weigand*, 414 U.S. 970 (1973), or agency proceedings for federal fund cutoff with attendant jeopardy to the rights of others. It is inconceivable that Congress meant to imply that agency "Russian roulette" with respect to federal funds should be the exclusive means of enforcing national policy specified in terms of individual rights in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

The schools again attempt to disparage the merits of petitioner's claim. (Jt.Br. pp. 10-16). However, they also concede that reliance on such matters would violate the standard established by this Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "The issue here is not whether there is merit to her claim. . . ." (Jt.Br. p. 11).

II

Second, the schools present excerpts from the legislative history of Title VI and Title IX to suggest that agency enforcement under section 2 was intended to be exclusive, subject to

judicial review under section 3. (Jt.Br. pp. 7-8, 16-32). Actually, as section 5 of each Title confirms, Congress pointedly rejected efforts to limit section 1 with the restrictions applicable to section 2. 42 U.S.C. § 2000d-4, 20 U.S.C. § 1685; 110 Cong. Rec. 5254, 5256, 13437, 13438. Moreover, Agency action under section 2 cannot provide an appropriate record for judicial review of agency action on individual rights. Aggrieved individuals cannot be parties to the agency proceedings. (Br. p. 1). Consequently, judicial review under section 3 is inadequate and not designed to protect or limit enforcement of the national policy expressed in terms of the rights of individuals in section 1 of each Title.

III

Third, the 1978 amendments of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, enacted after the filing of petitioner's brief, P.L. 95-478 and P.L. 95-602, do not conflict with petitioner's arguments based on the legislative history of those Acts as suggested by the schools. (Jt.Br. pp. 41-42). On the contrary, the 1978 amendments of both laws support the position of petitioner that Title VI and the acts patterned thereon, Title IX, section 504 of the Rehabilitation Act and, after the 1978 amendment repealed the express limitation of enforcement to agency action, the Age Discrimination Act, all contemplate a private right of action for the victims of the discrimination prohibited by such laws and provide for attorney's fees to encourage and support such private actions. (Br. pp. 6-7, 9-10). Cf. Sec. 401(c), P.L. 95-478 and Conf.Rpt. 95-1618, Sept. 22, 1978, p. 87; 124 Cong. Rec. (daily ed. Sept. 20, 1978) S. 15590-91, 15593.

IV

Fourth, the schools purport to distinguish more than 200 prior cases involving both constitutional claims and statutory

claims under Title VI or Title IX, including *Lau v. Nichols*, 414 U.S. 563 (1963), on the grounds that those cases either were decided under 42 U.S.C. § 1983 and the Constitution (Jt.Br. pp. 41-48), or that the question of federal jurisdiction was not decided therein. (Jt.Br. pp. 8, 41). Such distinctions conflict with two of the most deeply rooted doctrines of this Court that: (i) constitutional decisions will be avoided when non-constitutional grounds may be dispositive, and (ii) federal jurisdiction cannot be waived. Moreover, the former distinction of *Lau* conflicts with the express rationale of all of the opinions for the unanimous Court. (Br. pp. 12, 19).

V

Fifth, the schools' argument based on primary jurisdiction or exhaustion misconceives the nature of the agency procedures adopted and available to implement Title VI and Title IX. (Jt.Br. pp. 9, 33-38). Such procedures are not designed to insure the individual rights specified in section 1 or to provide any reasonable basis for judicial review of agency action with respect to an individual aggrieved thereby. (Br. p. 11). Only the recipient of federal funds has the right to participate in the agency proceedings. The individual victim of discrimination is not a party, 45 C.F.R. § 81.23, and, at best, may be accorded the status of an *amicus curiae*, 45 C.F.R. § 81.22(a). Realistic time frames required for agency action generally are not suited to appropriate relief for aggrieved individuals. *Price v. Yale University*, Civ. No. N77-277 (D. Conn. Dec. 6, 1978), recently confirmed the position of petitioner and the federal respondents after a hearing on the specific issue of the adequacy of HEW's Title IX procedures for an individual victim of alleged sex discrimination. The schools' argument, nevertheless, is predicated expressly upon their assertion that, "Petitioner's remedy lies against HEW under her alternative claim for relief before this Court." (Jt.Br. pp. 9, 51).

REPLY ARGUMENT

1. The "Introduction" distorts academic freedom, petitioner's claim and the record.

Academic freedom does not include any right to discriminate in admission to federally assisted schools on the basis of race or sex in defiance of national policy. The schools claim the "underlying issue" or the "ultimate question" is: "Among the qualified, how does one choose?" (Jt.Br. pp. 6, 10). The answer is not as the schools suggest that, if petitioner prevails, "the trial court chooses." (Jt.Br. p. 15). Petitioner could respond that, if the schools prevail, the answer would be that, "HEW chooses." However, the only proper answer is, that "The schools must choose without illegal discrimination in defiance of national policy."

Reconsideration of an applicant without regard to a policy found to discriminate illegally on the basis of race or gender in accordance with the procedures specified by this Court in *McDonnell Douglas* and *Jurinko* would not turn a trial court or HEW into the admissions committee. In employment those cases did not turn the court or the agency into the hiring committee and did not permit interference with legitimate hiring criteria based upon *bona fide* business grounds. There is no reason to fear that the same procedures would lead to interference with the academic freedom of a school, state or private, "to determine for itself *on academic grounds* . . . who may be admitted to study."¹

¹ *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring) (emphasis added). Admission decisions based on race, gender, religion, ethnic or other non academic grounds reflect the very antithesis of academic freedom. See the letter dated November 14, 1922 from Judge Learned Hand to the chairman of the Committee of the Faculties of Harvard University concerning a proposal to introduce a quota system at Harvard, primarily for the purpose of limiting the proportion of undergraduate students from Jewish families. "The Spirit of Liberty", Papers and Addresses of

While the schools concede that the "issue here is not whether there is merit to her claim," (Jt.Br. p. 11), their brief first points to certain of petitioner's academic qualifications, and suggests she was not admitted—or would not be admitted—to medical school on those grounds. (Jt.Br. p. 10). Incredibly, their brief also denies the very existence of the published admission policies at issue. (Jt.Br. pp. 12 n.6, 36). The facts of record are contrary.²

First, the schools say that 2,000 applicants at The University of Chicago had better "academic qualifications." In fact, the published median college grade point average ("GPA") of

Learned Hand edited by Irving Dilliard, Ch. 3 Christians and Jews (Alfred Knopf, New York, 1952).

² The factual record consists of the published data referred to in the verified complaints (App. pp. 3-21) and an affidavit (App. pp. 24-35) submitted in support of a motion for summary judgment by The University of Chicago which was not granted. No fact on which petitioner's claim was based, including the published age policy and the grade point and admission test data cited for petitioner and other applicants who were accepted, is contradicted by that conclusory affidavit as implied by the schools' brief. (Jt.Br. p. 10). Critical analysis of the affidavit may be found in the record. (U. Chi. Pltf. Ans. Mem. 9/2/75 pp. 29-35 and Pltf. Br. Reh. 12/20/76, App. pp. 1a-9a)

Repeated denial in the schools' brief (Jt.Br. pp. 11, 12 n. 6, 36) of the very existence of their own published age policies is flatly contradicted in the record (App. p. 7) and the public record. Such denials only highlight their concession that petitioner's application was rejected at the initial screening (Jt. Br. p. 13 n. 8) before meaningful evaluation of subjective factors was possible. (Jt.Br. pp. 13-14). Letters of recommendation were about the only evidence of subjective criteria available for initial screening. Petitioner's letters of recommendation were withheld from discovery by Chicago solely to preserve the school's obligation of confidentiality to the writers and with the stipulation that such letters were not the basis for denial of petitioner's application. (App. p. 7).

the 1973 entering class at Chicago was 3.55.³ Hers was 3.63. (App. p. 7).

Second, Chicago acknowledges that 12% of its entering class had average total Medical College Admission Test ("MCAT") scores below 575.⁴ Hers was 585. (App. p. 6).

Third, Chicago's Dean of Students conceded that his use of the term "academic qualifications" included the school's published statement that applicants "over 30 without advanced degrees . . . are not encouraged to apply."⁵

Finally, the schools say that petitioner's MCAT mathematical subtest score was in the lower 20% of the applicant group and that her science score was in the lower half. Apart from being factually wrong (she was in the 69th MCAT percentile on math and in the top third on science⁶), not one word either in the record or elsewhere suggests that respondents have ever, before this lawsuit, considered math scores as having any particularly significant bearing on medical school admissions.⁷ Her combined GPA and MCAT science

³ "Medical School Admission Requirements 1975-76" Association of American Medical Colleges.

⁴ *Id.*

⁵ (App. pp. 7, 10). Data that 18.1% of the applicants and 18.3% of the entering classes at Chicago were women (Jt. Br. p. 11 n. 5) would be meaningful only in the circumstance—unlikely but certainly unproven—that the spectra of male and female qualifications were almost identical. Actually, the aggregate percentages for 1972-75 conceal a decline in the acceptance percentage that was 3½ times as great for women as for men. (App. p. 26). Moreover, published admission policies which have a disproportionately adverse effect on women also must have a chilling effect on the number of women applicants.

⁶ (App. p. 10) The data cited is ranked by Medical College Admissions Test Records, Iowa City, Iowa.

⁷ The math score is of course included in the average total MCAT score.

score would have given her an approximately 70% chance of admission to medical school on these two criteria alone.⁸

The thrust of petitioner's complaint was not only that she was denied a *fair* chance at admission—she was denied *any* chance. Chicago and Northwestern University have published their selection procedures. Chicago's is of record. All applicants are preliminarily screened on the basis of their intellectual qualifications. "The student's scholastic record, along with his Medical College Admission Test scores, are used in this procedure." (App. p. 33). The survivors (10% at Chicago, 15% at Northwestern) are then interviewed.⁹ Petitioner's GPA and MCAT placed her comfortably within the group to be interviewed under this procedure. She was not.

The averments of the complaint and the stubborn facts are that petitioner was screened out at the initial level on the basis of her age. And as petitioner and others have demonstrated, "age" is, in practical effect, a euphemism for gender. (Br. pp. 5-6; App. pp. 7-14).

The schools argue that petitioner should be denied any opportunity to prove her claims because they may be contested and because her success on the jurisdictional issue may burden the courts with many other Title IX suits, some perhaps frivolous. (Jt.Br. pp. 10-13). Merely to suggest such a result, as did the court below, is to confirm the conflict with *Conley v. Gibson*, 355, U.S. 41 (1957). Difficult, frivolous and multitudinous litigation is not peculiar to Title IX.¹⁰

⁸ See the attached Table of Applicant—Acceptance Statistics. (App. p. A-1).

⁹ *Op. Cit. supra* note 3.

¹⁰ The very first element of a *prima facie* case under *McDonnell* and *Jurinko, supra*, is that the individual plaintiff be a member of a class against whom a policy or practice of the defendant discriminates on the basis of race or sex. It is difficult to imagine how any conscientious institution need contend with many such suits. The age rules in question occupy a substantial portion of the print space for the

The schools also claim, as did the court below, that Title IX should not be enforced as Title VI was enforced in *Lau v. Nichols*, 414 U.S. 563 (1974). The primary basis offered by the court below to reconcile its refusal to "stretch a statute by judicial interpretation" with the decision of this Court in *Lau*, namely an unprecedented jurisdictional preference for actions by "large groups", received only an oblique reference in the schools' brief. (Jt.Br. p. 46).¹¹ The alternative basis, express authorization in 42 U.S.C. § 1983, is flatly inconsistent with their view of the statutory scheme under the four factor analysis of *Cort v. Ash*, 422 U.S. 66 (1974) which also received cursory treatment. (Jt.Br. p. 32).

2. Argument under the statutory scheme overlooks Section 1983 and conflicts with the statutory terms and legislative history.

The schools claim that by providing administrative enforcement in the statutory scheme, Congress evidenced an intention to exclude judicial enforcement except by way of judicial review. Not a single congressman said so in the hearings, reports and debates on Title IX or Title VI. In fact, Congress declared that Title VI and Title IX "permit a judicial remedy through a private action." (Br. pp. 6, 10).

selection factors published by each school. Only the recalcitrant need fear any volume of civil rights litigation. Hopefully, most schools will be alert to self examination in light of developments elsewhere.

There is no reason to expect that the courts would, let alone must, become involved in related decisions which might be required to carry out an order to eliminate the effect of a policy or practice found to discriminate in defiance of national policy. State schools have not been inundated by actions under 42 U.S.C. § 1983. Frivolous civil rights actions are subject to the imposition of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

¹¹ *Cf.* (Jt.Br. p. 46) and 559 F.2d 1074 (Pet.Cert. App. pp. A-16, n. 16, A-17).

Mere provision for some administrative procedure to implement congressional policy generally has not been held to evidence an intention to preclude a judicial remedy. Indeed, administrative enforcement also is available in the situations where a judicial remedy has been most frequently implied. Note, "Implying Civil Remedies from Federal Regulatory Statutes," 77 *Harv L. Rev.* 285 (1963). This Court required explicit and uncontradicted evidence of congressional intent to reject private actions in *National Railroad Passenger Corp. [Amtrak] v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) and *Cort*.¹²

¹² One *amicus curiae* supporting the respondent schools (Br. Yale Univ. pp. 8-12) suggests, without support in precedent or logic, that the federal courts should be more hesitant to imply a private right of action in laws based on the spending power than in laws based upon the Commerce Clause or other constitutional powers of Congress. *Rosado v. Wyman*, 397 U.S. 397 (1970) is emphatically to the contrary notwithstanding the explanation that the decision rests on the Supremacy Clause. The legislation was an exercise of the spending power and the inherent related power, if not duty, of Congress to impose reasonable and constitutional conditions on the expenditure of federal funds. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) established that under the Necessary and Proper Clause all powers of Congress to legislate are limited only by the Constitution itself.

Neither the spending power nor any other power ought to be used to impose unconstitutional conditions. However, the application of that principle to this case is not apparent or articulated. A condition that federal funds not be used to support programs which discriminate on the basis of race or gender in defiance of national policy or that an enforceable contractual undertaking not to so discriminate be given, certainly is not unconstitutional or less worthy of the federal courts' assistance than conditions (including the same conditions) imposed under the Commerce Clause, the Fourteenth Amendment or some other power to legislate.

Logic and morality suggest that spending of the taxes levied upon all carries with it a greater than normal legal obligation on all branches of government to assure that national civil rights policy is

Most importantly, the schools' argument does not even attempt to account for the express authorization in 42 U.S.C. § 1983 of a private right of action by an individual under Title VI and Title IX in the case of state programs receiving federal financial assistance. The schools themselves elsewhere present exactly that argument in attempting to distinguish the more than 200 cases reported under Title VI and Title IX, including *Lau* and *Regents of the University of California v. Bakke*, 98 S. Ct. 2733 (1978). (Jt.Br. pp. 44-48).

If a private right of action would conflict with the statutory scheme in the case of private programs receiving federal financial assistance, precisely the same considerations apply in the case of state programs. Congress applied the same policy and the same administrative procedures to all programs receiving federal financial assistance, state and private.¹³

effectively implemented and not violated. (Br. p. 16). Indeed, there are limits that this Court would tolerate in the power of Congress to restrict the remedy for civil rights violations to agency action and judicial review—even if Congress were to impose such limits expressly.

Title VI and Title IX unquestionably include constitutional violations. Since both laws expressly subject all covered programs to the same policy and the same statutory scheme, this Court should not infer any limitation on a private right of action under either Title that it would not be willing to tolerate in a case involving the clearest possible constitutional overlap. Otherwise, in such a case, this Court would be constrained to decide the constitutional question where statutory grounds could be dispositive.

¹³ The schools' brief implies that the finding they are not within the purview of section 1983 is not challenged in the Petition. (Jt.Br. pp. 4-5). Such finding is challenged under *Conley* to the extent that the state action distinction is valid. (Pet.Cert. pp. 13-14; Br. pp. 17-18). Petitioner contends it is not. However, if the schools' theory that Title VI or Title IX may be enforced under pendant jurisdiction once federal jurisdiction has been established on some other grounds such as state action under 42 U.S.C. § 1983 is correct, the explicit allowance of private actions in the recent amendment of the Age Discrimination Act of 1975 in P.L. 95-602 has quite likely rendered this case moot in

By utilizing the state action distinction for *Lau*, the schools do not even purport to argue for an implicit exception of Title VI under section 1983, even to the extent that the statute and the regulations thereunder may go beyond the Constitution.¹⁴ But without such an exception they cannot sustain their argument based upon the statutory scheme. The identical scheme cannot mean one thing in the case of state schools and something else in the case of other schools receiving federal financial assistance.

The schools would have the Court rewrite section 1 of Title VI and its progeny, including section 1 of Title IX, by inserting an exception for programs operated by recipients of federal funds whose conduct does not constitute state action subject to 42 U.S.C. § 1983. They also would have the Court rewrite section 2 to provide that agency action should apply to any program receiving federal financial assistance, notwithstanding the exception they suggest for section 1. This, of course, is what the statute does not provide as confirmed by section 5, 42 U.S.C. § 2000d-4, and what the legislative history shows Congress pointedly refused to do.¹⁵

the schools' view because petitioner may now bring an age action against them and utilize pendant jurisdiction for her Title IX claim involved here. Amendment of the present complaints to the same effect also would appear to be available to moot the question presented—in their view of the prior cases.

¹⁴ See, *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan District Housing Authority*, 429 U.S. 252 (1977) as well as *Lau* itself.

¹⁵ The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, cited by the schools (Jt.Br. p. 19) does not present the same setting for application of the maxim, "*expressio unius est exclusio alterius*"—expression of the one is an exclusion of the other. Section 10 of NLRA contemplates administrative procedures specifically designed to enforce the individual rights protected in the legislation. Titles VI and IX do not. Recently this was confirmed after a hearing on this issue in *Price*, *supra*. The individual victim of alleged discrimination is not a party to the agency proceedings under Title VI

Excerpts from the legislative history offered by the schools (Jt.Br. pp. 23-28) to support the contention that section 2 of Title VI was designed to provide the sole means of enforcement for the policy stated in section 1, fail to include the other statements and actions which reveal the out-of-context nature of the comments presented. The quotations presented correctly reflect that section 2 was designed to implement the policy of section 1. However, they suggest (but do not state because no member of Congress stated) that section 2 was to provide the sole means of enforcement for the national policy expressed in terms of the rights of individuals in section 1. This is misleading.

For example, after Senator Dowdy observed that,

"The Constitution requires that citizens of the United States be treated as citizens of the United States." 110 Cong. Rec. 5254.

and Senator Talmadge stated,

"That right is enforceable in every court and the Senator from Minnesota knows it." *Id.*

Senator Humphrey responded,

"That is correct. The existing law of the land is stated in section 601. Sections 602 and 603 of H.R. 7152 do not represent an extension of the law. Those latter sections represent no new power. They represent a *limitation on*

or Title IX, 45 C.F.R. § 81.23 and is, at best, an *amicus curiae*, 45 C.F.R. § 81.22(a). The schools themselves recognize the point. (Jt.Br. p. 20).

Similarly, *Goldman v. First Federal Savings & Loan Assn. of Wilmette*, 518 F.2d 1247 (7th Cir. 1975) involved regulations adequately designed to effect the statutory policy. *Santa Clara Pueblo v. Martinez*, 98 S. Ct. 1670 (1978) is totally inapposite since it was based upon the policy of minimal incursions on tribal sovereignty, a policy unique to Indian relationships. The employment considerations raised by an *amicus curiae* (Br. Eq. Emp. Advisory Council) also are not present in this case.

the power of an affected agency to enforce existing powers" *Id.* (emphasis added).

Senator Talmadge continued,

"The people have the authority to go to court, and the Senator admits that they have that right." *Id.*

and Senator Humphrey responded without equivocation,

"Yes." *Id.*

There followed extended debate in which, ironically in the circumstances of this case, the opponents of the bill which became Title VI stressed their concern that because the exclusion of federal financial assistance by way of a contract of insurance or guaranty in section 602 did not limit section 601, Title VI could be used as a statutory authorization for an *executive* open housing or hiring order applicable to any individual homeowner with an FHA mortgage or individual farmer with crop support. Senators Humphrey and Pastore tried to discourage further amendment of the bill while carefully avoiding misstatement. Senator Case insisted upon maintaining a clear record that,

"the words and provisions of section 601 and the substantive rights established and stated in that section are not limited by the limiting words of section 602." 110 Cong. Rec. 5255, and

"For myself, I would not be satisfied if this language in section 602 is intended to limit existing rights of individuals under the Constitution, *or to limit the rights expressed in section 601* in any substantial sense. . . ." 110 Cong. Rec. 5256 (emphasis added).

Senator Humphrey replied,

"I thoroughly agree with the Senator insofar as the *individual* is concerned. . . . *There would be no limitation on the individual.* The limitation would be on the qualification of the Federal agencies." *Id.* (emphasis added).

Later, when Senator Long proposed an amendment to make it clear that Section 601 did not apply to *executive* action under contracts of insurance or guaranty, Senator Pastore opposed that amendment (which was designed to confirm the proposition which the schools urge that he supported) by stating,

"If we were to add the words that are suggested by the Senator from Louisiana, as a matter of policy, we would say in effect, 'But if it is a contract or guarantee, as a national policy, you can discriminate.' This section states a policy of non-discrimination. But by the proposed exception, we would create a policy of discrimination." 110 Cong. Rec. 13437.

and further,

"Section 601 is a statement against discrimination, not to create an exception in favor of it. I have nothing else to say." *Id.*

Senator Keating concurred,

"All that is necessary is to read section 601. The proposed amendment is absolutely and unquestionably unconstitutional. We cannot say that it shall be national policy under the Constitution to discriminate.

"Section 602 is entirely different. One can make a loan from the U.S. Government, *and the Federal agency is limited* in what it can do under section 602. But to write into the bill affirmative legislation that there is a national policy to discriminate is not only immoral and wrong; in my judgment, it is clearly unconstitutional." *Id.* (emphasis added).

Senator Dirksen concurred,

"The Senator from New Jersey [Sen. Case] is eminently correct when he states that [the Long amendment] is an invasion of a constitutional right." 110 Cong. Rec. 13438.

Senator Gore then expressed hope that the managers of the bill would come forward with acceptable language to prevent section 601 from providing "a statutory authorization for an open-housing *Executive order*." *Id.* (emphasis added). Senator Humphrey responded,

"We shall do so if the Senator will give us a moment."
Id.

Whereupon, Senator Long withdrew his amendment. Thus, the schools' attempt to suggest that section 602 was intended to limit individual rights under section 601 is unfounded and expressly contradicted in the legislative history of Title VI.¹⁶

Ultimately, of course, a new section 605 provided the legislative compromise for supporters of Title VI, including each member of Congress quoted by the schools, who had specifically refused to permit limitation of the non-discrimination policy of section 601, and, for opponents who not only recognized but took the lead in pointing out that section 602 does *not* limit section 601. Section 605 provides,

"Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty." 42 U.S.C. § 2000d-4.

The negative implication is clear. With respect to federal financial assistance extended in any other manner, such as the cash grants received by both respondent schools, Title VI does indeed "add to or detract from" existing authority. That it might "detract from" existing authority would have been outrageous in the situation sense of the Civil Rights Act of

¹⁶ In presenting the discussion between Senators Bayh and Dominick on Title IX enforcement (Jt.Br. p. 20) the schools similarly neglect to point out that fund cutoff was the only agency procedure which *required* hearings.

1964.¹⁷ Accordingly, Title VI itself plainly stated that it "adds to" existing authority with respect to any program or activity under which federal financial assistance is extended other than by way of a contract of insurance or guaranty. The identical provision was carried forward into Title IX, 20 U.S.C. § 1685.

With respect to the legislative history of Title VI presented in the schools' brief, two other statements require clarification.

First, the suggestion that "an earlier version of the bill provid[ed] for an independent right of action," (Jt. Br. p. 24 n. 17) is presented as a note to comment on "a private right of action." This is misleading in two respects: (i) the "private right of action" referred to was in Senator Keating's observation that he had urged such a right of action with respect to *fund cutoff* without success, 110 Cong. Rec. 7065, and (ii) the "independent right of action" noted in connection therewith was an *agency* right of action. Both the majority report and the minority report cited by the schools, House Report No. 914, 88th Cong., 1st Sess. p. 86, expressly recognized that deletion of the clause involved no substantive change whatever because

¹⁷ Notwithstanding the schools' assertion that petitioner's comparable statement with respect to the exemption of any program receiving federal financial assistance from a private right of action (Br. p. 16) is "pejorative" (Jt.Br. p. 22 n. 16), no such form of language is involved. The force of petitioner's arguments based upon the situation sense of the 1964 Act both here and in her main brief lies in their historical accuracy and not in the use of any pejorative language.

The schools further suggest that subsequent congressional confirmations of the understanding that a private right of action is implicit in the policy of Title VI and Title IX may be disregarded because they do not reflect the intent of Congress in 1964 and 1972, respectively, is unfounded and, in the case of Title IX just plain wrong. Court actions by individuals frequently were noted with approval in the history of the 1964 Act and, in section 712 of the 1972 law which included Title IX, P.L. 92-318, Congress concurrently and expressly recognized and provided attorney's fees for certain private suits under Title VI, 20 U.S.C. § 1617.

such an action was only one means already covered by the clause providing for enforcement "by any other means" than fund cutoff.

Second, the schools incorrectly state that, "Only Title VI of the non-discrimination Titles [of the Civil Rights Act of 1964] fails to provide a private right of action." (Jt. Br. p. 7). On the contrary, only Titles II and VII, 42 U.S.C. §§ 2000a *et seq.*, 2000e *et seq.*, involving privately owned accommodations and private employment, expressly provide a private right of action. Titles I, III and IV, 42 U.S.C. §§ 1971, 2000b *et seq.*, 2000c *et seq.*, involving governmental action, funds or facilities, clearly, indeed "expressly", assume that a private right of action is implicit, just as petitioner and the federal respondents urge that Title VI, involving federal financial assistance, implies a private right of action to the extent that such a right of action is not expressly authorized in 42 U.S.C. § 1983.

Clearly, Titles I, III, IV and VI all apply to many state programs or activities for which a private right of action is authorized by section 1983. However, they are not all limited to such state action. Title IV, for example, expressly covers schools supported predominantly by "governmental" funds—state, federal or both.¹⁸ It would be quite odd and unseemly for Congress to require expressly in Title IV that the Attorney General *inter alia* first determine and certify that private parties are unable to maintain appropriate legal action before he may act on their behalf and then, silently, limit enforcement of the non-discrimination policy of Title VI for the use of federal funds (other than by the "last resort" of fund cutoff) to suits by public authorities, the Attorney General or the agency.

¹⁸ The schools' suggestion (Jt.Br. p. 28) that Senator Ribicoff meant to confine agency enforcement "by any other means" than fund cutoff to action under Title IV (not VI) neglects to point out that the Senator gave that as only one example of such enforcement. The very next example he gave was specific judicial enforcement of contractual assurances such as those given by each respondent school to obtain federal funds under Title VI. 110 Cong. Rec. 7066.

It would have been inappropriate for Congress to limit federal judicial enforcement of statutes, regulations and contractual assurances related to federal financial assistance upon the presence of absence of state action. To infer such a procedure without an explicit mandate is incongruous. For Congress to have precluded judicial action in the case of recipients whose actions constitute governmental action, in many cases, would have been unconstitutional under Article III as well as the Fifth and Fourteenth Amendments.

3. Commentary on subsequent congressional actions avoids petitioner's argument.

Recent amendments of the Rehabilitation Act and the Age Discrimination Act confirmed petitioner's argument. Since the filing of petitioner's brief, Congress amended two of the laws relied upon by petitioner to confirm the view that Title IX and other laws patterned on Title VI imply a private right of action (Br. pp. 6-7, 9-10, 13-17) in accordance with the principle stated in the opinion of this Court in *Cort v. Ash*, 422 U.S. 66, (1974). Where "it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action". 422 U.S. at 82. Title VI, like Title IX, section 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, each grant rights with the language "No person in the United States shall . . . be excluded . . ."¹⁹

¹⁹ The principle is grounded in constitutional law on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and, in common law, on the legal maxim set out in the very first volume of Term Reports from the King's Bench—"Ubi jus, ibi remedium."—Where there is a legal right, there is a legal remedy. 1 Term R. 512. (Durnford & East's Reports), Black's Law Dictionary (Rev. 4th Ed.). In primitive law the rule was said to be the reverse. Petitioner suggests that may not have been so much of a rule as an observation comparable to this Court's observation in *Allen v. State of Board of Elections*, 393 U.S. 544 (1969) that unless private persons may sue, the statutory guarantee might "prove an empty promise." 393 U.S. at 557.

The application of *Cort* is clear. In P.L. 95-478, the Age Discrimination Act was amended, 42 U.S.C. § 610(e), (f), to repeal the express limitation of enforcement to administrative procedures, to require a specified notice for private actions, to provide attorneys fees for such actions, and to define the "exhaustion" of administrative remedies comparable to the requirements of Title VII of the Civil Rights Act of 1964. As claimed by petitioner on the basis of *Cort*, Congress assumed that a private right of action was implicit in the statutory policy patterned on Title VI absent *express* negation. (Br. pp. 6-7, 10). No express authorization of a private right of action is contained in the amended act—merely the unequivocal, indeed "express", assumption urged by petitioner.

Senator Cranston and Senator Bayh reviewed and confirmed the basis for implication of a private right of action for which the attorney's fees were being provided. 124 Cong. Rec. (daily ed. Sept. 20, 1978) S.15590-91, 15593. Continued rejection of a private right of action under Title IX would lead inexorably to the conclusion that Congress was more concerned about effective enforcement of its prohibition of age discrimination than about effective enforcement of its earlier prohibitions of race, gender and handicap discrimination in federally assisted programs. Yet the age legislation was plainly and avowedly based on the prior legislation.

In P.L. 95-602, the Rehabilitation Act also was amended to provide for attorney's fees on substantially the same terms

With his sharply illustrative humor, A. P. Herbert stated the rule as follows: "If Parliament does not mean what it says it must say so." *Rex v. Minister For Drains*, "Uncommon Law" p. 313 (Methuen & Co. Ltd., London, Ninth reprint 1959). Recently, in *Price v. Yale University*, Civ. No. N-77-277, (D. Conn. Dec. 6, 1978) the trial court confirmed its ruling that a private right of action is implicit under Title IX, specifically based upon the finding, after hearing, that administrative enforcement by HEW under section 902 is not designed to provide, and is not capable of guaranteeing, proper protection, of the rights afforded to each "person" by section 901.

that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provided for the legislation, including Title VI and Title IX, specified therein. This 1978 amendment again confirmed the prior legislative history reflecting that statutory policy language patterned on Title VI and Title IX contemplated comparable individual enforcement.

The schools also argue that the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988, established that the Act did not create any new private right of action. Petitioner agrees. She never has claimed otherwise. Petitioner claimed that the specific inclusion of Title VI and Title IX in the Act confirmed the earlier congressional declaration that such laws already "permit a judicial remedy through a private action." (Br. pp. 6, 10).

The bipartisan leadership reports reflected both the express understanding that a private action already was permitted under Title VI and Title IX and the express disclaimer of intent to create any new right of action.²⁰ Both thoughts are fully compatible and simply do not conflict as the schools insist. To argue the contrary is to assert that the reports of the leadership were openly and expressly inconsistent. Logic certainly does not require any inconsistency as the schools suggest.

Senator Kennedy's report specifically declared that amendment of the bill to include Title IX would avoid cost limitation of private enforcement by reason of the state action circumstances involved in *Lau*.²¹ Section 1983 already had been included in the original version of the bill. Subsequent addition of Title VI and Title IX would have been meaningless if Congress believed that private enforcement thereof either was

²⁰ 122 Cong. Rec. (Daily ed. Sept. 21, 1976) S.16251 report of Sen. H. Scott, S.16252 report of Sen. Kennedy, and (daily ed. Oct. 1, 1976) H.12150 *et. seq.* introduction by Reps. Anderson and Drinan and H.12159-60 report of Rep. Drinan.

²¹ 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16252.

not permitted or was limited to state action programs as the schools suggest.²² As stated in *Brown v. General Services Administration*, 425 U.S. 820 (1976),

"The relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."

Mere awareness that the original decision in this case had raised a question as to the existence of private actions under Title VI and Title IX does not indicate that Congress agreed with the court below.²³ In fact, enactment of the law notwithstanding an awareness of such decision indicates exactly the opposite. The terms of the Act itself, as well as the leadership reports and the remarks of virtually every congressman who spoke on the bill, confirm the congressional understanding that a private action already was permitted under both laws. The 1978 amendments providing attorney's fees for actions under the Rehabilitation Act and Age Discrimination Act again confirmed that congressional understanding.²⁴ (Br. pp. 9-10 n. 5).

²² Title IX was added through extraordinary procedures involving cloture of a Senate filibuster in the closing days of an election year Congress.

²³ The Senate apparently was unaware of the decision rendered only 25 days before it began final action. Even in the House, Rep. Rainsback, in referring to this case by name, indicated no awareness that the basis for the decision had been the asserted inconsistency of private actions with congressional intent. He conceded only that he was informed "there exists a serious question". 122 Cong. Rec. (daily ed. Oct. 1, 1976) H.12161. His remark would be a gross understatement by anyone familiar with the decision below.

²⁴ Since judicial review under section 3 of both Title VI and Title IX can be meaningful only with respect to parties to the agency proceedings and the individual victim of discrimination is not a party in the agency hearing, 45 C.F.R. § 81.23, the schools' argument (Jt.Br. p. 43) that the law was directed to fees in post administrative judicial review actions suggests that the Act properly might be renamed—in their view—as the "Civil Rights Defense Attorney's

4. The state action distinction of prior decisions conflicts with the analysis of the statutory scheme and two basic doctrines of this Court.

Much of petitioner's reply appropriate to the schools' argument distinguishing prior decisions, including *Lau* and *Bakke*, as state action cases already has been made above in replying to their opposite argument based on the statutory scheme. *Bakke* presented a unique exception to prove the rule. Four Justices decided solely on the basis of the statute and five Justices, differing on the result, agreed that so-called "reverse" application of the statute "goes no further" than the Constitution itself. Eight Justices decided or assumed that Title VI permitted a private right of action. In *Lau* all opinions for the unanimous Court relied upon the statute, the guidelines or the federal funding contract and not upon the Constitution. (Br. pp. 19-20).

The schools' brief claims that jurisdiction in such cases was based on 42 U.S.C. § 1983. However, section 1983 is not a jurisdictional statute. *Blue v. Craig*, 505 F.2d 830 (4th Cir. 1974). The related jurisdictional statute is 28 U.S.C. § 1343(3). Jurisdiction is conferred on the federal courts just as clearly by 28 U.S.C. § 1343(4) in non-state action civil rights cases under Title VI or Title IX.

The schools' argument that this Court enforced Title VI and the HEW regulations in *Lau* on the basis of some form of jurisdiction pendant to that established under section 1983

Fees Awards Act of 1976." This suggestion clashes with the most cursory reading of the statute and its history.

In connection with the 1978 amendment of the Age Discrimination in Employment Act of 1975, P.L. 95-478, to permit private actions and to provide attorney's fees to encourage such actions, Senators Bayh and Cranston removed any doubt as to the congressional perceptions on which all such legislation was founded. 124 Cong. Rec. (daily ed. Sept. 20, 1978) S.15590-91, 15593.

conflicts with their views of the statutory scheme. There they assert Congress evidenced its intention that administrative action followed by judicial review should be the exclusive remedy.

If the schools' distinction of prior decisions, including *Lau* and *Bakke*, as state action cases under section 1983 is correct, a private action cannot be in conflict with the statutory scheme of Title VI or Title IX. The prior decisions of this Court then require the implication of a private right of action under the four factor analysis articulated in *Cort*. The identical statutory scheme cannot mean one thing in the case of state programs and something else in the case of other programs receiving federal financial assistance.²⁵

5. Doctrines of primary jurisdiction and exhaustion do not apply to a remedy which is not available.

The record establishes beyond dispute that federal administrative enforcement, if exclusive, has been unreasonably delayed or withheld in violation of 5 U.S.C. § 706. Delay of over 3½ years without so much as preliminary findings is acknowledged by all parties. Such delay of an exclusive remedy for violation of national policy is unreasonable even without reference to *Conley*.

Accordingly, the decisions of this Court in *Allen v. State Board of Elections*, 393 U.S. 544 (1969) and *Rosado v. Wyman*, 397 U.S. 397 (1970) as well as the related decision of the Seventh Circuit in *Lloyd v. RTA*, 548 F.2d 1277 (7th Cir. 1977), require the judicial remedy sought by petitioner and

²⁵ The reasons offered by the schools for the necessity of prior agency action (pp. 33-38), particularly the litany of quotations from the Congressional Record (Jt. Br. p. 35), are absurd when qualified by an exception for state programs.

supported by the federal respondents.²⁶ The doctrines of primary jurisdiction and exhaustion relied upon by the university respondents (Jr.Br. pp. 33-38) do not apply where meaningful administrative action may, but need not, be provided by the relevant agency or official. *Levers v. Anderson*, 326 U.S. 219 (1945). Delay of equitable relief until application has been made for the potential administrative relief is the limit of those doctrines in such circumstances. *U.S. v. Abilene & So. Ry. Co.*, 265 U.S. 274 (1924), *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977), *Mendoza v. Levine*, 412 F. Supp. 1105 (S.D. N.Y. 1976).

CONCLUSION

The importance and substantiality of the question presented in the Petition has not been denied by the university respondents. The only claim is that a judicial remedy may be premature. But judicial action cannot be premature where, as here, the alleged necessity of following further administrative proceedings plainly conflicts with the absence of such proceedings for almost four years. Such circumstance, in and of itself, justifies reversal.

In light of the schools' agreement with petitioner that she should have a judicial remedy for unreasonable delay against HEW and the agreement of HEW with petitioner that she should have a judicial remedy against the schools, the need for reversal of the action below is indisputable. No party has urged that petitioner should continue without any remedy at this late date.

²⁶ The schools' asserted distinction of *Lloyd* (Jt.Br. pp. 34, 40-41) overlooks that the time delay here involved is even greater and under an identical regulatory situation. Moreover, *Lloyd* expressly left open the question of limiting judicial action to post administrative review of agency action as "premature". 548 F.2d at 1286 n. 89. Cf. *Price v. Yale University*, *supra*.

For the foregoing reasons, the judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

Table of Applicant—Acceptance Statistics

Overall GPA (and Letter Grades)	MCAT Science Subtest Scores					
	Lower Scores			Higher Scores		
	200s	300s	400s	500s	600s	700s
Higher Grades	Quadrant II			Quadrant I		
	0	4	55	442	933	278
3.8-4.0 (A)	1	15	101	586	1,047	292
3.4-3.7 (A- & B+)	1	32	317	1,964	2,429	432
	5	110	791	3,162	3,167	496
3.0-3.3 (B)	1	57	338	1,550	1,602	196
	17	338	1,931	4,948	3,332	307
Lower Grades	Quadrant III			Quadrant IV		
	3	58	227	546	346	53
2.6-2.9 (B- & C+)	36	540	1,965	3,294	1,511	131
2.0-2.5 (C)	2	60	196	196	88	9
	90	716	1,449	1,389	576	30
0.0-1.9 (below C)	1	10	11	8	4	0
	16	112	115	54	18	0

Figure 1

Distribution of applicants and acceptees by undergraduate college grade-point average (GPA) and by scores on the Science subtest of the Medical College Admission Test (MCAT) for the 1973-74 entering class. Numerator in each cell is number of acceptees with indicated grades and MCAT scores; denominator is number of applicants with these characteristics.

Source: Association of American Medical Colleges. Petitioner's overall GPA was 3.63 and her MCAT science subtest score was 585. (App. pp. 6-7).

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CITIZENS WITH DISABILITIES, INC.; DISABILITY
RIGHTS CENTER, INC.; NATIONAL ASSOCIATION
OF THE DEAF LEGAL DEFENSE FUND OF THE
NATIONAL ASSOCIATION OF THE DEAF; WESTERN
LAW CENTER FOR THE HANDICAPPED; STATE OF
INDIANA PROTECTION AND ADVOCACY SERVICE
COMMISSION FOR THE DEVELOPMENTALLY
DISABLED; ADVOCATE FOR THE DEVELOP-
MENTALLY DISABLED; ADVOCACY, INC.; AND
WISCONSIN COALITION FOR ADVOCACY
AMICI CURIAE**

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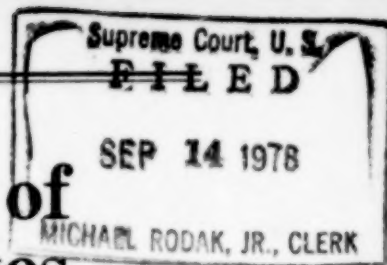


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AMICI CURIAE

INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed by national and state
groups concerned about the civil rights of handicapped persons.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, prohibits discrimination against otherwise qualified handicapped persons in programs receiving Federal financial assistance. Section 504 follows closely the language of Title IX, the statute at issue in this case, as well as Title VI of the Civil Rights Act of 1964. The legislative history of Section 504 indicates that Congress intended for the three statutes to be enforced uniformly and that the private right of action Congress recognized for Section 504 was influenced by what Congress viewed as a private right of action under Title IX and Title VI. *Amici* argue that, given the close relationship among these three statutes, a brief to this Court on Section 504, its history, its interpretation by the courts and its administration by the Department of Health, Education and Welfare would be useful to the Court in the resolution of this important case. Moreover, a decision by the Court on the issue of a private right of action under Title IX will certainly influence the future enforcement by courts and administrative agencies of Section 504.

The *amici* filing this brief are both national and state organizations working with issues of the legal rights of handicapped persons. The National Center for Law and the Handicapped, Inc. of South Bend, Indiana (NCLH) is a research, advocacy, and education organization concerned with questions involving the legal rights of physically and mentally handicapped persons. NCLH is sponsored by the American Bar Association Family Law Section, the Council for the Retarded of St. Joseph County Indiana, Inc., the National Association for Retarded Citizens, and the University of Notre Dame Law School. NCLH has served as *amicus curiae* in this Court, as well as in state and federal courts throughout the United States.

The American Coalition of Citizens with Disabilities, Inc. of Washington, D.C. (ACCD) is the largest

organization directed by disabled people themselves to advocate on behalf of virtually every category of disabled Americans in every sector of life, as well as to work for the civil and human rights of disabled people. ACCD is an umbrella organization consisting of seventy-five member associations of and for disabled people with a combined membership exceeding seven million.

The Disability Rights Center, Inc. of Washington, D.C. is a public interest organization which engages in research on matters affecting the social and legal problems of persons with disabilities, and prepares, publishes and disseminates material concerning the legal rights of handicapped persons.

The National Association of the Deaf Legal Defense Fund (NAD-LDF) of Washington, D.C. is part of the National Association of the Deaf, the largest non-profit organization of deaf consumers in the United States with affiliates in forty-eight states. The NAD-LDF represents hearing-impaired people in litigation to advance their rights.

The Western Law Center for the Handicapped of Los Angeles, California is a non-profit public interest group which provides legal services to physically and mentally handicapped individuals whose legal problems stem from their handicaps and to organizations of handicapped individuals which advocate enforcement of the human rights of handicapped persons. The Western Law Center has worked in areas of employment discrimination, education of handicapped children, housing discrimination, architectural barriers, anti-trust and welfare law.

In addition to these national organizations, several state organizations established pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.*, join in this brief. These agencies provide legal

assistance and other forms of advocacy and protection to mentally retarded persons and persons with cerebral palsy, epilepsy, autism or any other closely related condition which results in an impairment similar to that of mental retardation or which requires treatment or services required by mentally retarded persons. These agencies are the State of Indiana Protection and Advocacy Service Commission for the Developmentally Disabled of Indianapolis, Indiana; Advocate for the Developmentally Disabled of New Orleans, Louisiana; Advocacy, Inc. of Austin, Texas; and the Wisconsin Coalition for Advocacy of Madison, Wisconsin.

Amici represent a wide range of persons with handicaps and view the issue of a private right of action under the Title VI-Title IX-Section 504 scheme as essential to the achievement of civil rights for handicapped persons, as well as for other minorities protected by those statutes. *Amici* are familiar with Section 504, its purposes and its significance for handicapped persons and believe that their participation in this case would be of benefit to the Court. The parties have consented to the filing of this Brief.

STATEMENT OF THE QUESTION PRESENTED

Does Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*, provide a private right of action to Petitioner?

STATEMENT OF THE CASE

In 1975 Petitioner Geraldine G. Cannon was denied admission to the Pritzker School of Medicine of the University of Chicago and to the Northwestern University Medical School. In April, 1975 Ms. Cannon filed written complaints against the medical schools with the Department of Health, Education and Welfare (H.E.W.) alleging that the schools had discriminated against her on

the basis of sex in violation of Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (a). As late as June 2, 1976, H.E.W. had completed only the on-site portion of the investigations into Ms. Cannon's allegations, and H.E.W. was unable to advise when findings would be made in the complaints filed. *Petition for Writ of Certiorari*, at A-35.

In the summer of 1975, Petitioner filed lawsuits against each medical school alleging, *inter alia*, that the actions of the schools violated Title IX, particularly with respect to an age criterion which had the effect of discriminating against women. Petitioner subsequently amended her complaints in the lawsuits to join the Secretary of the Department of Health, Education and Welfare and the Regional Director of H.E.W.'s Office for Civil Rights, seeking an injunction against those defendants prohibiting H.E.W. from further delay in its action with respect to her administrative complaints against the two medical schools.

The District Court held that Title IX did not authorize a private right of action. *Cannon v. University of Chicago*, 406 F. Supp. 1257 (N.D. Ill. 1976). The Court of Appeals affirmed, 559 F.2d 1063 (7th Cir. 1976), and on rehearing also held that the inclusion of Title IX within the provisions of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, did not imply an intent on the part of Congress to provide for a private right of action under Title IX. 559 F.2d at 1077. On rehearing, the Federal defendants reversed the position which they had asserted and argued that Title IX does provide a private right of action to individual litigants. While both the District Court and the Court of Appeals ruled on issues other than those involving Title IX, this Statement of the Case sets forth only the facts immediately concerning the Title IX issue before this Court.

SUMMARY OF ARGUMENT

In three statutes, Congress prohibited discrimination against women and certain minorities in Federally assisted programs. In addition to the rights granted to women in education programs by Title IX, Title VI of the Civil Rights Act of 1964 prohibited discrimination on the basis of race, color, or national origin and Section 504 of the Rehabilitation Act of 1973 prohibited discrimination against otherwise qualified handicapped persons. Section 504 was modeled on Title VI and Title IX and the legislative history of Section 504 reveals that Congress intended that the three statutes be enforced in a uniform manner. The private right of action recognized by courts under Section 504 is based not only upon the legislative history of that statute, but also upon this Court's interpretation of Title VI and implementing regulations in the context of the original legislative purpose behind Title VI. Enforcement of Title IX, as well as with Title VI and Section 504, will require independent judicial efforts.

The administrative enforcement procedures by which the lower court held Title IX should be enforced are not established primarily for the protection of individual rights and the resolution of individual complaints, but as a means for the Federal government to carry out its statutory obligation to terminate funds when recipients violate the law. A conflict may occur between such departments as Health, Education and Welfare which, in resolving a discrimination complaint, may wish to avoid the severe sanction of a termination of Federal funds (thereby injuring other beneficiaries of the program) and the individual complainant who seeks a remedy for a violation of the law. The secondary role of individual complainants is exemplified by the provisions in H.E.W. procedures which give you a complainant the status only of *amicus curiae*, without rights of a party, in administrative enforcement

proceedings. Considerations such as comity in a Federal system may influence the decisions of administrative officers in enforcement proceedings more than concerns about the rights of individuals. A private right of action is essential to protect the rights of individuals whose interests may vary from those of H.E.W.

The private right of action is further necessary for individual complainants because of the inadequacy of existing administrative procedures to enforce the law properly. H.E.W. has indicated that it is unable to resolve the large number of complaints filed under Title IX, as well as under Section 504. The Department's admitted failure to meet all of the requirements imposed on it by law is evident not only from the position taken by the Federal defendants in this case, but in published statements by the department making proposals to revise its enforcement process. Moreover, in an affidavit filed in pending litigation and appended to this Brief, H.E.W. indicates its willingness to have complaints brought under Section 504 resolved directly by the courts.

ARGUMENT

I. THE PRIVATE RIGHT OF ACTION RECOGNIZED UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 SHOULD ENCOMPASS CLAIMS BROUGHT UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972.

A. Section 504, Title IX and Title VI of the Civil Rights Act of 1964 Are Analogues in the Federal Legislation To Combat Discrimination in Federally Financed Programs and Activities.

Section 504 of the Rehabilitation of 1973, 29 U.S.C. §794, reads:

No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 504 was modeled on Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (a), which reads in pertinent part:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...[with exceptions stated].

Both statutes reflect the influence of Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, which reads:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

These three Federal statutes form a triad to prohibit discrimination against protected individuals by recipients of Federal financial assistance. The legislative history of Section 504 clarifies the relationship among the three provisions:

Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964...and section 901 of the Education Amendments of 1972...The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.

The language of section 504, in followig [sic] the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with section 504. This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would

ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections. The Secretary of the Department of Health, Education, and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504. The conferees fully expect that H.E.W.'s section 504 regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act (P.L. 93-112) was enacted over one year ago—September 26, 1973.

4 U.S. Code, Cong. and Admin. News 6390-6391 (1974); see *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277, 1285-1286 (7th Cir. 1977).

The enactment of Section 504, together with other civil rights provisions of the Rehabilitation Act of 1973, marked a new day for handicapped persons in this Nation. Section 501 of the Act, 29 U.S.C. §791, imposed requirements on the federal government itself in the employment of handicapped individuals; Section 502, 29 U.S.C. §792, created the Architectural and Transportation Barriers Compliance Board, with the primary function of enforcing the Architectural Barriers Act of 1968, 42 U.S.C. §4151 *et seq.*;

and §503, 29 U.S.C. §793, imposed affirmative action requirements on certain federal contractors in their employment of handicapped individuals. Together these provisions, for the first time in the history of the United States, marshaled the civil rights enforcement power of the Federal government on behalf of handicapped persons. This legislation marked with unmistakable authority the change in our national policy toward handicapped persons from one of paternalism and purported benevolence to one of an active quest for legal equality. The rationale underlying this new direction was well expressed by Congress in the White House Conference on Handicapped Individuals Act, Pub. L. 93-516, 88 Stat. 1631-1634, Section 301:

[I]t is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps;...

29 U.S.C. §701 (note).

B. A Private Right of Action Exists Under Section 504.

In *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977), the court interpreted Section 504 to create affirmative rights on behalf of handicapped persons which could be enforced by means of a private right of action. While *Lloyd* was not the first case to enforce Section 504 on behalf of private litigants, see e.g. *Bartels v. Biernat*, 405 F. Supp. 1012 (E.D. Wis. 1975), *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W.Va. 1976), it was the first case to consider fully the question of the intent of Congress with respect to private enforcement of Section 504. The reasoning in *Lloyd* was quickly adopted and followed by other circuits. *Leary v. Crapsey*, 566 F. 2d 863 (2d Cir.

1977), *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977), *United Handicapped Federation v. Andre*, 558 F. 2d 413 (8th Cir. 1977), *Davis v. Southeastern Community College*, 574 F. 2d 1158 (4th Cir. 1978) *reh. den.* No. 77-1237 (4th Cir. June 29, 1978).

Lloyd involved a challenge by physically handicapped persons to continued federal assistance to an inaccessible public transportation system partly on the theory that such inaccessibility violated Section 504. In holding that a private right of action existed under Section 504, the court relied not only on the legislative history of Section 504 with its analogies to Title VI and Title IX, but also upon this Court's holding in *Lau v. Nichols*, 414 U.S. 563 (1974). Just as in *Lau* this Court looked to regulations promulgated by the Department of Health, Education, and Welfare to suggest the contours of the rights asserted by the school children in San Francisco, 414 U.S. at 566-569, the Court of Appeals in *Lloyd* looked to regulations promulgated by the Urban Mass Transportation Administration to determine whether affirmative rights existed comparable to those which this Court identified in *Lau*. The *Lloyd* court, like this Court, in *Lau*, did not specify a remedy or the exact dimensions of the rights available to the litigants. But in *Lau*, this Court had stated:

Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

414 U.S. at 566.

Adapting this language to the situation before it, the *Lloyd* court concluded that affirmative rights existed under Section 504:

Under these [federal] standards there is no equality of treatment merely by providing [the handicapped] with the same facilities [as ambulatory persons]...; for [handicapped persons] who [can] not [gain access to such facilities] are effectively foreclosed from any meaningful [public transportation]. (citation and footnote omitted.)

548 F. 2d at 1284.

The *Lloyd* court read the legislative history language "[to] permit a judicial remedy through a private action" as "contemplat[ing] judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F. 2d at 1286. The court expressly left open as premature the question of whether the judicial remedy established would be limited to post-administrative judicial review once procedural enforcement regulations were issued. *Ibid.*, n. 29. However, in a footnote the court did say, "[A]ssuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a *posteriori* judicial review." *Ibid.* Still, the court concluded:

[I]t is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts (footnote and citation omitted).

548 F. 2d at 1286.¹

¹ The Court of Appeals appears to have been confused on the issue of the Department of Health, Education and Welfare's enforcement process and the applicability of that process to the dispute in *Lloyd*. In proposed regulations to implement Section 504 for programs and activities receiving assistance from H.E.W., the Secretary indicated that once consolidated procedural rules for administration and enforcement of certain civil rights laws for which H.E.W. had

Based upon the legislative history of Section 504 and what the Court of Appeals in *Lloyd* called "a virtual one-to-one correspondence between the conceptual props supporting the concurring opinion in *Lau* and the elements of the instant case," 548 F. 2d at 1281, the court found that the criteria in *Cort v. Ash*, 422 U.S. 66 (1975), were met. Plaintiffs, as physically handicapped individuals, were

(footnote 1 cont'd)

responsibility were promulgated, the Section 504 enforcement procedures would be through that mechanism. 41 F.R. 29548 (July 16, 1976). However, both the substantive regulations and the administrative enforcement mechanisms apply only to recipients of federal financial assistance from H.E.W. 45 C.F.R. §84.2. The defendants in *Lloyd* received federal financial assistance from the Department of Transportation; therefore, the H.E.W. enforcement procedures, had they existed, would never have been applicable to the alleged violation in *Lloyd*. The consolidated enforcement procedures for H.E.W. have still not been promulgated, and H.E.W. at present enforces Section 504 by means of the Title VI procedures. 45 C.F.R. §84.61. In an Analysis, the Secretary indicated his adoption of the Title VI complaint and enforcement procedures "until such time as they are superceded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department." 42 F.R. 22694 (May 4, 1977).

What may have confused the Court of Appeals was the authority given to H.E.W. by Executive Order 11914 as the principal department to coordinate implementation of Section 504 by other executive departments and agencies. 41 F.R. 17871 (April 29, 1976). H.E.W. had indicated that its proposed departmental regulations would be used in developing subsequent Executive Order guidelines. 41 F.R. 29548 (July 16, 1976), a position reiterated upon publication of the final H.E.W. departmental regulations. 42 F.R. 22677 (May 4, 1977). On January 13, 1978 H.E.W. published the final version of the Executive Order regulations. 43 F.R. 2132 (January 13, 1978), and on June 8, 1978 the Department of Transportation (DOT) published proposed regulations to comply with the Executive Order guidelines. 43 F.R. 25016 (June 8, 1978). The proposed DOT regulations provide a procedural enforcement mechanism which generally follows existing DOT Title VI enforcement procedures. 43 F.R. 25021, 25033-25035 (June 8, 1978).

among the class specifically benefitted by the statute. 548 F. 2d at 1285. The private cause of action was consistent with the statute's legislative history. 548 F. 2d at 1286, 4 U.S. Code, Cong. and Admin. News 6390-6391. The private cause of action implied was consistent with the general legislative scheme of the Rehabilitation Act of 1973 which had one explicitly detailed purpose to "enforce statutory and regulatory standards and requirements regarding barrier-free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals." 548 F. 2d at 1286, quoting 29 U.S.C. §701(11). A private right to sue would serve to enforce the uniform substantive standards established by administrative regulations, without resulting in spotty *ad hoc* remedies in various portions of the country. Finally, the private remedy would not undercut litigation in suits traditionally relegated to state law in areas basically the concern of the states. Congress intended the legislation underlying the litigation to deal with the "transportation needs of the handicapped on a national basis." 548 F. 2d at 1287.

The *Lloyd* court was aware of the initial decision in the instant case and commented upon the distinction between the large class in *Lau* (and *Lloyd*) and the individual plaintiff in *Cannon*. Moreover, as the *Lloyd* court found "no administrative remedy open to these plaintiffs," it held that neither exhaustion nor primary jurisdiction applied. 548 F. 2d at 1287.

With this view of the *Lloyd* case, the instant case gains some perspective. The view taken by the court below toward the issue of a private right of action is not simple. The court rejected a private right of action accruing from a

sole individual complaint before what it considered to be adequate exhaustion of administrative remedies. 559 F.2d at 1073. The holding stems from a concern for the most efficient use of limited judicial resources and from a view that providing direct access to courts would not be an effective remedy to the problem of slow H.E.W. administrative enforcement procedures. 559 F. 2d at 1075.

The court also discerned some advantages in requiring the plaintiff in this case to utilize the administrative procedures before seeking judicial review of her complaint. Referring to the doctrine of primary jurisdiction, the court identified specific factors which might justify deferring to agency expertise: the evaluation of the statistics of the applicant and entering classes at the various medical schools and the comparison of local practice to admissions policies on a national basis. 559 F. 2d at 1074-1075, n. 17. Additionally, the scheme of enforcement created by Congress, in the court's view, may indicate a desirable plan to have H.E.W. screen complaints, encourage their resolution, and seek voluntary compliance with the statute. In this respect, the court seemed to suggest that before complainants become litigants in a judicial proceeding, they should give the voluntary compliance alternative a chance to work. 559 F. 2d at 1081.

Although the court rejected the private right to sue in this case, it by no means approved of judicial abdication in the enforcement of Title IX. It distinguished the instant case from one where large numbers of persons allege class discrimination, a situation for which the court, apparently, would more likely reserve the private right to sue (although it did not decide this issue, 559 F. 2d at 1074, n. 16.) Of course, the court recognized the provision of Title IX allowing for judicial review of administrative action, 20 U.S.C. §1683. 559 F. 2d at 1073. But the court's most

important reservation for a private right of action, at least in terms of the issue before this Court, concerned those cases where no remedy was provided or where the remedies were inadequate:

Were we confronted with an alleged violation of a fundamental federal constitutional or statutory right for which Congress has provided no remedy at all, or for which the remedies available have proven to be wholly inadequate to the task of protecting those rights, we might take a different view of the matter.

559 F. 2d at 1082.

The private right of action under Section 504 recognized in *Lloyd* originated from that court's determination that the legislative mandate embodied in the statute must be given immediate application. While *Lloyd* differs from *Cannon* in that there were no administrative remedies for the plaintiffs to exhaust and while *Lloyd* may appear to be consistent with *Cannon* in that it at least acknowledged the possibility that, given meaningful administrative enforcement remedies, exhaustion would be required, *Lloyd* does not turn upon either point. The essence of *Lloyd* is that, "[I]t is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action". 548 F. 2d at 1286. The express intent of Congress to create a remedy, as well as the absence of any intent by Congress to deny a remedy, together with the fact that the plaintiffs in *Lloyd* would have been left with no effective way to protect their civil rights had the court not implied a private right to sue, led the *Lloyd* court to recognize a private right of action. Exhaustion of administrative remedies as well as deferral to administrative agencies on the basis of primary jurisdiction are, under a proper reading of *Lloyd*, to be allowed only where such action is consistent with the underlying legislative mandate. To the extent that *Cannon* subordinates the

legislative purpose in providing a remedy under Title IX, it conflicts with *Lloyd* and that court's reading of the legislative history of Section 504, which we assert is determinative of the legislative intent of Title IX.

In *Lau v. Nichols*, 414 U.S. 563 (1974), this Court, solely on the basis of Section 601 of the Civil Rights Act of 1964, reversed a decision denying relief to non-English speaking students of Chinese ancestry who sought appropriate instruction from the San Francisco, California school system. This Court, interpreting the statute and regulations promulgated to implement the statute by the Department of Health, Education and Welfare found a basis for Federal courts to shape an appropriate remedy. The concurring opinion of Mr. Justice Blackmun is properly read, in our view, as concerned with the rationale for the remedy, not with the right to sue. As he stated, "I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction." 414 U.S. at 572. In *Regents of University of California v. Bakke*, ____ U.S. ____, 98 S. Ct. 2733 (1978), four Justices of this Court concluded that Title VI of the Civil Rights Act of 1964 provided a private cause of action to an individual litigant. ____ U.S. ____, 98 S. Ct. at 2811, (Stevens, J., concurring and dissenting). That view is based not only upon legislative history, but upon the holding in *Lau*, as well as the third party beneficiary theory of *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), *cert. den.* 388 U.S. 911 (1967). Moreover, those Justices pointed to *Lloyd* and its interpretation of the legislative history of Section 504 as an example of legislation enacted

by Congress on the assumption that Title VI may be enforced in a private action. 98 S. Ct. at 2814-2815, n. 27. See *Davis v. Southeastern College*, *supra* and *Kampmeier v. Nyquist*, *supra*, where courts recognized a private right to sue for individual plaintiffs under Section 504.

C. Effective Enforcement of Title IX Requires Independent Judicial Action.

The court below viewed the administrative procedures as an enforcement mechanism largely divorced from the power of courts to enforce the statute. Judicial enforcement, in the court's view, would be limited to the review of administrative action provided for by 20 U.S.C. §1683 and possibly to cases involving a large number of complainants. How the court would interpret the right to judicial action because of inadequate administrative enforcement procedures is unclear.

We submit that the role of judicial enforcement envisioned by the court under Title IX is much too limited and contrary to the tradition of active and independent enforcement of civil rights statutes by Federal courts. In the early enforcement efforts by federal courts to implement Title VI, a critical and independent judicial attitude emerged toward the actions of administrative agencies with respect to Title VI. In *United States v. Jefferson County Board of Education* 372 F.2d 836 (5th Cir. 1966), *cert. den.* 389 U.S. 840 (1967), *reh. den.* 389 U.S. 965 (1967), *aff'd* 380 F.2d 385 (5th Cir. 1967), the United States Court of Appeals for the Fifth Circuit had occasion to consider Guidelines promulgated by the Department of Health, Education and Welfare to effect desegregation of public school systems. The question before the court was not explicitly exhaustion of administrative remedies, but judicial consideration of administrative determinations of

appropriate desegregation efforts. The court noted the importance of active and independent judicial scrutiny of the issues:

The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities. 372 F. 2d at 848 (footnote omitted).

The situation in the mid-sixties was such that the court viewed the activity of administrative agencies as intended by Congress to aid overworked courts in achieving rapid change:

We read Title VI as a congressional mandate for a change—change in pace and method of enforcing desegregation. The 1964 Act does not disavow court-supervised desegregation. On the contrary, Congress recognized that to the courts belongs the last word in any case or controversy. But Congress was dissatisfied with the slow progress inherent in the judicial adversary process. Congress therefore fashioned a new method of enforcement to be administered not on a case by case basis as in the courts but generally, by federal agencies operating on a national scale and having a special competence in their respective fields. Congress looked to these agencies to shoulder the additional enforcement burdens resulting from the shift to high gear in school desegregation.

372 F. 2d at 852-853 (footnotes omitted).

Jefferson County reflects a partnership between the courts and administrative agencies in the enforcement of national civil rights. As the court stated, "When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy." 372 F. 2d at 856. This active, independent attitude is also evident in *Kelly v. Altheimer, Arkansas Public School District No. 22*, 378 F. 2d 483, 492 (8th Cir. 1967), where the

court stated, "Regardless of the steps which may be taken by H.E.W. to secure compliance, we will not avoid our responsibility in the matter." See also, *Singleton v. Jackson Municipal Separate School District*, 355 F. 2d 865, 869 (5th Cir. 1966), *Kemp v. Beasley*, 352 F. 2d 14, 19 (5th Cir. 1965). In *Alexander v. Holmes County Board of Education* 396 U.S. 19, 21 (1969), this Court approved judicial cooperation with H.E.W. in desegregation, subject to modifications which the appropriate court deemed proper.

The spirit of active, independent judicial enforcement of the rights guaranteed by Title VI in these cases should be carried over to enforcement of Title IX. The task which these courts perceived was to enforce the law, whether by means of judicial action alone, administrative action, or a cooperative combination of both court and administrative action.

A similar independence is emerging in judicial enforcement of Section 504. In *Camenisch v. University of Texas*, ____ F. Supp. ____, No. A-78-CA-061 (W.D. Tex. May 17, 1978), the court granted a preliminary injunction for a deaf graduate student suing under Section 504 to secure an interpreter to enable him to participate in classes. See 45 C.F.R. §84.44(d). The court's opinion aptly summarizes the difficulties of relying on administrative enforcement solely to implement Section 504:

The applicable HEW regulations contain no provisions for providing emergency relief of the nature requested by Plaintiff. All administrative complaints are treated similarly. Plaintiff submits, in his Memorandum in Opposition to Defendants' Motion to Dismiss, the Office for Civil Rights' Annual Operating Plan for Fiscal Year 1978 reveals that only 26 of 756 handicap complaints filed in 1978 will be investigated. An HEW finding in Plaintiff's favor one

or two years from now will give him no effective relief whatsoever, for, as the stipulations show, he may very well have lost his employment by then. If, on the other hand, HEW found for Defendants, it could order Plaintiff to reimburse the cost of interpretive services paid by Defendants. Plaintiff has previously offered such a course of action to Defendants, including his willingness to post an appropriate bond, but Defendants are unwilling.

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The *Camenisch* court found that "[E]xhaustion procedures are meaningless with respect to this Plaintiff..." *Ibid.* The court did require the plaintiff to pursue administrative remedies *after* the granting of the preliminary injunction, but here the court utilized the administrative agency for assistance. The court retained its enforcement authority over the statute. See also *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977). While some courts have required exhaustion, *Doe v. New York University*, 442 F. Supp. 522 (S.D.N.Y. 1978), *Barnes v. Converse College*, ____ F. Supp. ____, Civil Action No. 77-1116 (D.S.C. March 31, 1978) *appeal docketed*, No. 78-1440 (4th Cir. July 19, 1978), we believe that the *Camenisch* analysis is more consistent with the intent of Congress in enacting Section 504.

It should be noted that the United States as *amicus curiae* in *Whitaker v. City University of New York*, Docket No. 75 Civ. 2258 (JM) (E.D.N.Y. 1978) has taken the position that, "Section 504 is subject to enforcement by private litigants without prior exhaustion of administrative remedies." *Memorandum Of The United States As Amicus Curiae In Opposition To Defendants' Motion To Dismiss Section 504 Rehabilitation Act Claims* at 2. The position of the Government there is that a private plaintiff is not required

to secure administrative review prior to initiation of suit under Section 504. *Ibid.* at 9. The Government explicitly concedes that "[T]he regulations and available administrative remedies do not meet the *Lloyd* standards." *Ibid.* at 10. While the question of a private right of action is obviously one for the courts to decide, the Government's admission of the need for a private right of action under Section 504 and of the inability of administrative agencies to implement the statute should weigh heavily on the courts' determination that a private right of action is necessary.

II. THE ADMINISTRATIVE ENFORCEMENT PROCEDURES BY WHICH TITLE IX AND RELATED STATUTES ARE IMPLEMENTED ARE NOT APPROPRIATE FOR THE PROTECTION OF THE CIVIL RIGHTS OF INDIVIDUALS.

Courts and commentators have noted the limitations of the enforcement procedures for Title VI-Title IX-Section 504 and have interpreted the purposes of those statutes in terms of the limited enforcement procedures. In *Mayor and City Council of Baltimore v. Mathews*, 562 F. 2d 914 (4th Cir. 1977), the court commented on the purposes of Title VI:

Title VI is a remedial rather than a punitive statute. It was designed to eliminate the financial participation of the federal government in illegal discrimination. At the same time, because federal aid has taken on increased significance in the funding of public education, it provides an economic incentive to end discrimination without resort to the judicial process. (Footnotes omitted).

562 F. 2d at 923.

In an opinion concurring in part and dissenting in part, Judge K. K. Hall divided the H.E.W. enforcement process into three parts:

- (1) The voluntary compliance phase;
- (2) The administrative hearing phase;
- (3) The phase when the actual fund termination occurs. 562 F. 2d at 928.

In Judge Hall's view, "[T]he underlying thrust of Title VI requires HEW first to secure voluntary compliance eliminating discrimination if such method is reasonably possible." (citation omitted) 562 F. 2d at 930. See also *Adams v. Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972), *aff'd* 156 U.S. App. D.C. 267, 480 F. 2d 1159 (1973); *Johnson v. County of Chester*, 413 F. Supp. 1299, 1311 (E.D. Pa. 1976).

As one court noted, there are "many procedural bridges that must be crossed" before a legal sanction for violation of Title IX will take effect. *National Collegiate Athletic Association v. Califano*, 444 F. Supp. 425, 438 (D. Kansas 1978). The principal sanction available to a plaintiff for violation of Title IX is a funding cut-off, see *McCarthy v. Burkholder*, 448 F. Supp. 41 (D. Kansas 1978). More than a decade ago, the United States Court of Appeals for the Fourth Circuit commented that "The [administrative] complaint procedure is far from the most efficient or comprehensive means of enforcing Title VI." *Cypress v. Newport News General and Nonsectarian Hospital Association*, 375 F. 2d 648, 659 (4th Cir. 1967). Moreover, the dilemma presented to H.E.W. in terminating funds, and the potential conflict of interest with complainants who present cases of discrimination to H.E.W., is well expressed in this statement by a legal commentator:

The Department's only weapon, although one that none of the parties want to see employed, is the threat of a termination of federal funds. Since virtually no one benefits from the school's loss of aid money, the

prospect of whole-hearted HEW prosecution may be remote from the beginning. Moreover, in the informal negotiations, HEW, for the sake of harmony or of saving the expense of the hearing process, might settle for a plan that falls far short of what the complainants envisage. In the hearings, the Department might opt not to oppose all the policies and practices that the complainants find objectionable. It might not pursue the attack with all the vigor that the complainants may wish. This exhaustive procedure is thus likely to result only in an indirect blow to the discrimination. In these circumstances, the complainant may well prefer to take more direct action. Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 Texas L. Rev. 103, 120 (1974).

The peculiar status of the persons who file administrative complaints in the H.E.W. enforcement process is illustrated by the provision which states that persons submitting complaints are not considered parties to the proceedings to resolve those complaints, but may petition, after proceedings are initiated, to become *amicus curiae*. 45 C.F.R. §81.23. The status of *amicus curiae* given to complainants is nothing more than that available to "[a]ny interested person or organization [who] may file a petition to participate in a proceeding..." 45 C.F.R. §81.22(a). The presiding officer may grant the petition if the officer finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the proceedings. As an *amicus curiae*, the complainant may not introduce evidence at the hearing. However, under the rules governing the administrative enforcement proceedings, an *amicus curiae* may request the presiding officer to propound specific questions to the witness. It is in the discretion of the presiding officer to grant any such request if the officer believes the proposed

additional testimony may assist materially in elucidating factual matters at issue between the parties and that the proposed questions will not expand the issues. 45 C.F.R. §81.22(c).

The complainants can very likely become the forgotten person in the enforcement process. The scheme of the regulations, and indeed of the legislation itself, is to use the complaint filed by an individual seeking redress against discrimination as a precipitating mechanism for the Department's monitoring enforcement process. The enforcement process is very much a matter between the Federal government and the recipients of Federal funds. The process is intended primarily to enable the government itself to make sure that recipients do not violate the underlying legislation. Resolution of a particular complaint is, in this process, only an incidental benefit to be granted to complaining parties.

The subsidiary role of the complainant in the enforcement process is further evident from the heavy emphasis in Title IX on the securing of voluntary compliance in enforcement of the Act. Title IX requires that no action to terminate or refuse funds shall be taken until it has been determined that compliance cannot be secured by voluntary means and, before termination, a report must be filed with the committees of the House and the Senate having legislative jurisdiction over the program or activity involved, setting forth the circumstances and grounds for termination. Termination may not become effective until thirty days have elapsed after filing of the report. 20 U.S.C. §1682. Likewise, when enforcement is by other means authorized by law, no action may be taken to effect compliance until the responsible Department official has determined that compliance cannot be secured by

voluntary means, the recipient has been notified of its failure to comply and of the action to be taken to effect compliance, and ten days have expired from the mailing of the notice to the recipient or any other person. During the ten day period, additional efforts must be made to persuade the recipient to comply with the regulations and to take such corrective action as may be appropriate. 45 C.F.R. §80.8(c), (d).

The overriding concern of this scheme of enforcement is not with the rights of individuals who suffer discrimination, but rather with harmony in a Federal system. The emphasis on voluntary compliance is intended to avoid conflicts within the Federal system between the National government and recipients of Federal financial assistance, particularly those recipients which are units of state or local government. In the compliance enforcement process, pursuant to the mandate to effect voluntary compliance, the concerns of individual complainants may be lost as enforcement officials attempt to secure broader policy goals. While such a compliance system may indeed well serve a purpose of Title IX in eliminating some kinds of discrimination, it does not adequately meet the requirement that recipients not discriminate on the basis of sex against persons. The administrative enforcement mechanism is inadequate for purposes of resolving individual complaints, and a private cause of action is necessary to enforce the rights of individuals.²

² The problems outlined above have been explicitly acknowledged by the Government with respect to the enforcement of Section 504. In the *Memorandum of the United States as Amicus Curiae* in *Whitaker, supra*, the Government states:

The administrative process established by Congress as part of Title VI centers entirely on the question of whether in light of

(footnote 2 cont'd)

the policies and practices of a recipient of federal assistance, federal funds should continue to flow. It is predicated upon the need by the Secretary for a fund cut-off procedure which in turn permits the Secretary to carryout [sic] his or her responsibility under the statute. The Secretary's duty is to terminate federal funds if a recipient continues to discriminate or refuses to correct the effects of past discrimination. The purpose of an administrative hearing, thus, is to provide the Secretary with a forum in which to initiate termination proceedings. It is not intended to provide, nor has it operated as, a forum for program beneficiaries to litigate claims of discrimination against recipients. Unlike Title VII of the Civil Rights Act of 1964 [footnote omitted] which creates a primary mechanism for alleged victims of discrimination to utilize a federal agency to litigate on their behalf, the Title VI administrative process is for the use of the agency alone.... Additionally, the administrative remedy available under §504 is essentially prospective... Although future compliance may include rectifying the effects of past discrimination, as a practical matter this process may not afford effective or expeditious relief to individual victims of unlawful discrimination...

[T]he filing of an individual complaint with the Secretary of the Department of Health, Education and Welfare does not result in any type of quasi-judicial process which will result in a determination of whether the individual's rights under the statute have been violated. Only an *investigation*, not a resolution, is provided for. In conducting an investigation of possible noncompliance, the Secretary acts on behalf of the United States and the grantor of Federal funds, and is not responsible for resolving the matter on behalf or in the interests of the complainant...

[T]he hearings are designed to enforce the contract between the Secretary and the recipient. [Citation omitted]...

Indeed, if HEW is unable to resolve a complaint which it believes to be justified, HEW's course of action would be to seek termination in an administrative enforcement proceeding. This sanction would close HEW's involvement in the case while according the aggrieved party no individual relief. Thus, the fund termination procedures would not regress an individual's grievance.

Ibid. at 11, 12, 13, 15, 16.

III. A PRIVATE RIGHT OF ACTION IS NECESSARY IN THIS CASE BECAUSE EXISTING ADMINISTRATIVE PROCEDURES ARE INADEQUATE TO ENFORCE THE LAW.

In the court below, the Department of Health, Education and Welfare, on rehearing, took the position that a private right of action lies under Title IX. 559 F. 2d at 1080. The Department recognized private suits as a useful means of enforcing the statutory policy of prohibiting discrimination on the basis of sex in Federally funded educational programs. 559 F. 2d at 1081. The United States has taken a similar position with respect to Section 504 in cases presently pending before Federal courts. *Memorandum of the United States as Amicus Curiae in Whitaker*, supra; *Brief for the United States as Amicus Curiae in Trageser v. Libbie Rehabilitation Center, Inc.*, No. 77-2224 (4th Cir.). The position taken by the United States should, in itself, be sufficient to demonstrate the need for private litigation in enforcement of Title IX because of the overburdened administrative process. But even without this admission by the United States, the public statements of the Department of Health, Education and Welfare are alone sufficient to demonstrate that the present scheme of administrative enforcement is not working.

With respect to Title IX, in 1975 H.E.W. issued proposed consolidated procedural rules to enforce certain civil rights provisions. 40 F.R. 24148 (June 4, 1975). The Department commented that the existing enforcement procedures had been developed primarily to implement Title VI of the Civil Rights Act of 1964 and were "expressly tailored to meet the Department's needs in a busy but relatively limited area." *Ibid.* At that time, the Department proposed shifting from a policy that was "reactive or complaint-oriented [and]

geared toward securing individual relief for persons claiming discrimination," to a policy of "a methodical approach geared toward identifying and eliminating systemic discrimination." *Ibid.* The Department expressed concern that a complaint-oriented enforcement system would not reveal all of the problems with sex discrimination which deserved Department attention, noting that more complaints involving sex discrimination in higher education academic employment had been received than on any other subject.

Nearly a year later, in connection with the Consolidated Procedural Rules, H.E.W. issued an "Intent to Issue Notice of Proposed Rulemaking." 41 F.R. 18394 (May 3, 1976). This document was concerned with "the difficult question of designing effective procedures for managing an increasing number of civil rights complaints." Noting the importance of the issue, the Department described the "astronomical growth in the number of cases which must be considered" and characterized its action as "an open advertisement for ideas...[to] shape a national response to these very difficult questions." *Ibid.*

Together, these statements by H.E.W. indicate difficulties the Department has encountered in enforcing Title IX. The experience under Section 504 has been somewhat similar.³ Implementation of Section 504 was not

³ H.E.W.'s reluctance to resolve individual complaints is also evident from its policy under Section 504. With respect to the proper classification and placement of handicapped children in preschool, elementary, and secondary education programs and the due process procedures established for resolving disputes over placement of those students, H.E.W. stated:

While the Department does not intend to review individual placement decisions, it does intend to ensure that testing and evaluation procedures required by the regulation are carried

be any means immediate. The delay of H.E.W. in issuing regulations provoked a lawsuit. In *Cherry v. Mathews*, 419 F. Supp. 922 (D.D.C. 1976), plaintiff sued the Secretary of H.E.W. to promulgate regulations. The response of the Department was that the statute imposed no explicit duty to issue regulations, in contrast to the direct conferral of rulemaking authority under Title VI. The Department's position contradicted clear legislative history. See 4 U.S. Code Cong. and Admin. News p. 6390 (1974). The court concluded that the Secretary was required to promulgate regulations effectuating Section 504; it took note of draft and proposed regulations already issued by the Secretary, 41 F.R. 20296 (May 17, 1976), 41 F.R. 29548 (July 16, 1976), but refused to establish a date by which final regulations must issue. The court did retain jurisdiction over the case to assure that "no further unreasonable delays affect the promulgation of regulations under §504." 419 F. Supp. at 924.

In its first published version of the proposed §504 regulations, H.E.W. took this position with respect to private judicial enforcement of the regulations:

Section 84.6 [later consolidated with modified proposed Section 84.7 to form final regulation 45 C.F.R. §84.5] requires, as do both title VI and IX regulations, a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Because such an assurance is, in effect, a contract between the Department and the recipient, it has the effect of

(footnote 3 cont'd)

out, and that school systems provide an adequate opportunity for parents to challenge and seek review of these critical decisions. And the Department will place a high priority on pursuing cases in which a pattern or practice of discriminatory placements may be involved. 42 F.R. 22677 (May 4, 1977).

giving aggrieved persons who are beneficiaries of federally assisted programs or activities the right to seek judicial enforcement of the regulation, under the third party beneficiary principle of contract law. See *Lemon v. Bossier Parish*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd* 370 F. 2d 847 (5th Cir. 1967), *cert. den.* 388 U.S. 911 (1967).

41 F.R. 20300 (May 17, 1976).

The second published version of the proposed H.E.W. Section 504 regulations carried this language *verbatim*. 41 F.R. 29552 (July 16, 1976).

In the final regulations, published May 4, 1977, the accompanying Analysis states:

Private rights of action. Several commentators [to proposed versions of the regulations] urged that the regulation incorporate provision [sic] granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of the Government. There is, however, case law holding that such a right exists. *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); see *Hairston v. Drosick* [423 F. Supp. 180 (S.D. W.Va. 1976)]; *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976) [*aff'd on other grounds* 556 F. 2d 184 (3d Cir. 1977)] cf. *Lau v. Nichols*, *supra*.

Analysis to 45 C.F.R. §84.5, 42 F.R. 22687 (May 4, 1977).

In guidelines established by H.E.W. pursuant to its authority under Executive Order 11914, 41 F.R. 17871 (April 29, 1976), to coordinate implementation of Section 504 for the Executive Branch, "Supplementary Information" published with the guidelines addressed the private right of action issue. These regulations are in addition to the H.E.W. Section 504 regulations, which apply to H.E.W.

programs. The Section 504 Executive Order guidelines are intended to guide other executive departments in their implementation of Section 504. Here H.E.W. states:

One comment [to the proposed Executive Order Section 504 guidelines] requested a statement by the Department that this regulation creates no judicially enforceable rights. Such a statement, we believe, is inappropriate and unnecessary. Whether any legally enforceable rights are created by this regulation is a matter for courts to decide. We would only observe that the regulation applies to Federal agencies, not to recipients, and that it has no retroactive reach.

43 F.R. 2133 (Jan. 13, 1978). Analysis to regulations to be codified at 45 C.F.R. §85.4.

These statements by H.E.W. on the issue of a private right of action under Section 504 indicate at most a desire to see private litigation used to implement Section 504 and at least a deference to the courts in determining whether such litigation should be permitted. Certainly, H.E.W. has not expressed hostility in these statements to the concept of a private right of action. As the affidavit of Michael A. Middleton, appended to this brief, stated, "The Office for Civil Rights, as a matter of policy, believes that complainants should have a private right of action under Section 504 in federal courts, and that beneficiaries of H.E.W. programs should be allowed to file civil actions in federal courts without exhausting either the grievance procedures established by a recipient...or the Department's own complaint investigation procedure." Appendix at A2—A3.

Moreover, in an "Annual Operating Plan" for fiscal year 1978 for enforcement of nondiscrimination provisions in federally assisted programs, H.E.W. indicates that of 756 complaints expected to be filed in fiscal year 1978, which

H.E.W. estimates will be reduced to 664 by means of initial screening, only 26 will be investigated. Of 453 backlog complaints, only fourteen will be investigated. 43 F.R. 7054 (Feb. 17, 1978). See also the Middleton affidavit. Appendix at A3. It is therefore clear why one district court found that the H.E.W. administrative enforcement process provided "no effective relief whatsoever" for one plaintiff seeking relief under Section 504. *Camenisch v. University of Texas*, *supra* at 3.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court allowed private citizens to bring a lawsuit to enforce the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.* Noting that in the Act there was "certainly no specific exclusion of private actions," 393 U.S. at 555, n. 18, the Court commented on the importance of allowing a private right to sue:

The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the subdivisions thereof. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the §5 approval requirements.

393 U.S. 556-557 (footnotes omitted, emphasis in the original.)

It is clear that H.E.W. is unable to enforce the Title VI-Title IX-Section 504 scheme solely by means of administrative remedies. It is also clear that if individual complainants are required to depend solely on H.E.W., the

rights of those individuals as guaranteed by the legislation will not be adequately protected and the purposes of the legislation will be thwarted. For these reasons, a private cause of action must be allowed under Title IX.⁴

CONCLUSION

The private right of action under Title IX granted to individuals must be recognized as consistent with the legislative history, as necessitated by the structure and inadequacy of the administrative enforcement process, and as required to implement the statute. *Amici Curiae* urge that the judgment of the Court of Appeals be reversed and the case remanded.

Respectfully submitted,

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National Center for Law and
the Handicapped, Inc.
1235 North Eddy Street
South Bend, IN 46617

Attorney for *Amici Curiae*

⁴ On rehearing, the Court below rejected the argument that the inclusion of Title IX within the provisions of the Attorney's Fees Award Act, 42 U.S.C. §1988, implied that Congress intended to create a private right of action under Title IX. 559 F. 2d at 1080. While *amici* herein have not addressed this issue in the belief that it will be fully addressed by the parties and other *amici*, we believe it worth noting that in legislation to amend the Rehabilitation Act, a provision has been included to allow courts to award any prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs in any action or proceeding to enforce Section 504, as well as other civil rights provisions of the Rehabilitation Act. H.R. 12467, 95th Cong., 2nd Sess. §119.

APPENDIX

**AFFIDAVIT OF MICHAEL A. MIDDLETON
FILED WITH *MEMORANDUM OF THE
UNITED STATES AS AMICUS CURIAE IN
OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS SECTION 504 REHABILITATION
ACT CLAIMS***

IN

**WHITAKER v. CITY UNIVERSITY OF
NEW YORK, Docket No. 75 Civ. 2258 (JM)**

A-2

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

AFFIDAVIT OF MICHAEL A. MIDDLETON

Michael A. Middleton, Director, Division of Policy and Procedures, Office of Policy, Planning and Research, Office for Civil Rights, Department of Health, Education, and Welfare, being duly sworn, deposes and says:

1. The Office for Civil Rights in the Department of Health, Education, and Welfare has enforcement responsibilities for Section 504 of the Rehabilitation Act of 1973 and the Department's implementing regulations, 45 C.F.R. Part 84. My division, in the Office of Policy, Planning and Research, is responsible for the development of policy under Section 504.

2. The Office for Civil Rights, as a matter of policy, believes that complainants should have a private right of action under Section 504 in federal courts, and that beneficiaries of HEW assisted programs should be allowed to file civil actions in federal courts without exhausting either the grievance procedures established by a recipient pursuant to 45 C.F.R. 84.7 or the Department's own complaint investigation procedures established pursuant to 45 C.F.R. 80.7. Such a standard for Section 504 is consistent with Departmental policy followed under Title VI of the Civil Rights Act of 1964, the statute prohibiting discrimination on the basis of race, color or national origin in federally assisted programs. The legislative history of the Rehabilitation Act Amendments of 1974 states that Section 504 should be enforced in the same manner that the Department enforces Title VI.

A-3

3. It is important that beneficiaries of HEW funded programs have a choice of forum for complaints of alleged discrimination. The Office for Civil Rights has a large backlog of complaints and there is presently no guarantee that any newly filed complaint can be investigated and resolved in an expeditious manner. It would be inconsistent with the Department's desire and the public's need for the speedy resolution of complaints to prohibit aggrieved parties who wish to file suit from doing so and then subject them to a lengthy period of time before acting upon their claim.

It would therefore work a hardship on complainants if they were only allowed access to the courts after they had exhausted their administrative procedures.

/s/ Michael A. Middleton

Michael A. Middleton, Affiant

Subscribed and sworn to before me, this 26th day of June, 1978.

/s/ Loraine Holloway

Notary Public

My Commission Expires:
January 1, 1979. (LH)

FILED

SEP 15 1978

MICHAEL R. DAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, et al.,

Respondents.

GERALDINE G. CANNON,

Petitioner,

v.

NORTHWESTERN UNIVERSITY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**Brief of the National Urban League, the American Jewish
Committee, the Puerto Rican Legal Defense and Education
Fund, the National Association for the Advancement of
Colored People, The Mexican American Legal Defense and
Education Fund, and the Anti-Defamation League of B'nai
B'rith, Amici Curiae**

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MISCELLANEOUS

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(1978)*

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Statement of Joseph A. Califano, Jr., Secretary
of Health, Education and Welfare,
HEW Press Release, June 26, 1978

5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-926

GERALDINE G. CANNON,

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ON WRIT OF CERTIORARI TO
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FOR THE SEVENTH CIRCUIT

**Brief of the National Urban League, the American Jewish
Committee, the Puerto Rican Legal Defense and Education
Fund, the National Association for the Advancement of
Colored People, the Mexican American Legal Defense and
Education Fund, and the Anti-Defamation League of B'nai
B'rith, Amici Curiae**

STATEMENT OF INTEREST

This brief is submitted by written consent of all parties on
behalf of the National Urban League, the American Jewish
Committee, the Puerto Rican Legal Defense and Education
Fund, the National Association for the Advancement of

Colored People, the Mexican American Legal Defense and Education Fund, and the Anti-Defamation League of B'nai B'rith. Each of these groups is a national civil rights organization dedicated to the realization of equal opportunity and equal protection for all citizens of the United States. In particular, each group is concerned that equal educational opportunity be afforded to all citizens, including women and racial and ethnic minorities.

INTRODUCTION

This case presents the question whether Congress succeeded in its evident intent to establish for every person in the United States the right to be free from sex discrimination in specific federally assisted education programs.

The court below would frustrate that intent by holding that a woman cannot vindicate her rights by her own lawsuit, that she can do no more than entreat a federal bureau to commence its process. In that process she is at best a bystander, at arm's length. Moreover, that process is designed not to correct the wrong she has suffered but to vindicate the federal agency's interest in assuring that its funds are not misused. The court says that the duty of federally aided institutions not to discriminate runs not to her, but to the federal government. She is left to abide by the "sophisticated scheme" of the Department of Health, Education and Welfare — a scheme compounded of massive bureaucracy, the vagaries of politics, the remoteness of Washington.

Such a position is contrary to American tradition. The principle that the courts will provide remedies in order to protect federal statutory rights dates to the earliest decisions of this Court. And as recently as 1970, this Court held that an individual could assert his rights in court under a federal statute governing a state welfare program,

that he was not to be left dependent on what a federal administrative agency might decide to do. *Rosado v. Wyman*, 397 U.S. 397 (1970). The courts consistently have recognized private rights of action to remedy discrimination prohibited by Title VI of the 1964 Civil Rights Act¹ — the statute on which Congress deliberately patterned Title IX of the 1972 Education Amendments.²

The position of the court below would also create a two-tiered scheme for enforcement of the right to be free from sex discrimination. Those victimized by public institutions would have access to the courts, but those suffering discrimination by private institutions would be relegated to an unwieldy and ineffective administrative process. The absolute prohibitions Congress enacted in the Civil Rights Act of 1964 and in Title IX of the 1972 Education Amendments cannot support this differential treatment: under their language the right to be free from discrimination is just as complete against the private institution as against that maintained by the state.

A. The Statute

Two provisions of Title IX bear on this case. The first is section 901, which provides in sweeping and unqualified terms:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

20 U.S.C. § 1681(a) (Supp.V, 1975). Then there is section 902, which directs federal agencies offering financial assistance to education to issue regulations and general orders implementing the prohibition of section 901. Section

¹42 U.S.C. § 2000d *et seq.* (1970).

²20 U.S.C. § 1681 *et seq.* (Supp. V, 1975).

902 provides essentially that federal agencies may effect compliance with their administrative requirements through a process that commences with discussion aimed at voluntary compliance and leads, upon a formal determination of a failure to comply with an administrative requirement, to the ultimate sanction of a termination or refusal of federal funding. Section 902 also requires that the appropriate committees of Congress be notified at least 30 days before any proposed refusal or cut-off of funding is to become effective. 20 U.S.C. § 1682 (Supp. V, 1975).

Thus Congress enacted two distinct provisions. Section 901 contains the absolute mandate that "No person in the United States" shall suffer sex discrimination in any education program covered by the statute: it establishes the personal right of the individual to be free of sex discrimination. Section 902, on the other hand, is concerned with protecting the rights of recipient institutions in the administrative process used to enforce non-discrimination requirements.

B. The Administrative Agency

The Department of Health, Education and Welfare administers the vast preponderance of the federal programs assisting education to which Title IX is directed. HEW has promulgated substantive regulations repeating and, in some cases, elaborating upon the statutory prohibition of section 901.³ It has also prescribed procedures for the section 902 termination process through adoption by reference of procedural regulations previously issued under Title VI of the Civil Rights Act.⁴

HEW's procedural regulations are not designed to aid individual victims of discrimination. An individual complainant is to be notified in writing if an investigation indicates no need for further HEW action, but she receives no

³45 C.F.R. § 86 (1977).

⁴45 C.F.R. § 86.71 (1977).

notice if in fact the investigation discloses noncompliance with the statute. If HEW suspects that an applicant or recipient has discriminated, it can take no action without a hearing. Significantly, the right to be heard belongs to the applicant or recipient — not to the complaining victim. Under § 81.23 of HEW's rules, a complainant "is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become *amicus curiae*."⁵ As an *amicus*, a complainant may file a brief but is not entitled to submit evidence. Moreover, because a complainant lacks party status she cannot file exceptions to a hearing examiner's initial decision under § 80.10(a), nor can she petition the Secretary for review under § 80.10(e) or § 81.106.

In practice, applicants for and recipients of HEW funds have not needed the safeguards contained in these regulations. In six years, HEW's Office of Civil Rights has not once cut off federal funding to discourage non-compliance. Indeed, HEW Secretary Califano recently admitted that "Title IX has not been adequately enforced." He has acknowledged the Department's "appalling legacy of unreviewed complaints, inadequate staffing, and little development of policy."⁶

ARGUMENT

I. TITLE IX CREATES PERSONAL RIGHTS ENFORCEABLE IN PRIVATE ACTIONS.

A. Section 901 Creates Personal Rights.

The sweeping language of section 901 makes plain the congressional purpose behind Title IX: "No person in the

⁵Indeed, a complainant is not even assured *amicus* status. 45 C.F.R. § 81.22(a) (1977) provides that the "presiding officer may grant [a] petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof."

⁶Statement of Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, HEW Press Release, June 26, 1978.

United States shall, on the basis of sex," suffer discrimination in federally assisted education programs. These words do not connote protracted administrative proceedings or bureaucratic encouragement of compliance — instead they unequivocally prohibit discrimination. Senator Bayh, the principal sponsor of the bill that became Title IX, explained that it was designed to provide women "an equal chance to attend the schools of their choice." To that end Congress enacted this "strong and comprehensive measure . . . to provide women with solid legal protection" from "pernicious discrimination" in education.⁸

The prohibitory language of section 901 closely tracks the wording of section 601 of the Civil Rights Act of 1964.⁹ In enacting the 1972 Education Amendments, Congress expressed its view that Title IX "is really the same thing as the Civil Rights Act in terms of race,"¹⁰ that Title IX was enacted to close the "loophole" in the 1964 Act, which failed to reach discrimination by sex.¹¹ The courts have construed the parallel language of section 601 to be "a prohibition, not an admonition."¹² The legislative history of

⁷118 Cong. Rec. 5808 (1972).

⁸118 Cong. Rec. 5804 (1972).

⁹Section 601 states:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

¹⁰117 Cong. Rec. H. 39,256 (daily ed. Nov. 1, 1971) (statement by Rep. Green, to which Rep. Waggoner assented). Senator Bayh added that his amendment set forth "prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972).

¹¹118 Cong. Rec. 5807 (1972).

¹²*Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852 (5th Cir.), cert. denied, 388 U.S. 911 (1967); see also *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974); cf. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1280 (7th Cir. 1977).

Title VI demonstrates that Congress had a purpose broader than simply ending federal support of discriminatory institutions. Congress believed that "action to end [ethnic] discrimination is preferable [to termination of funding] since that reaches the objective of extending the funds on a nondiscriminatory basis."¹³ There is no reason to believe Congress had a different or less compelling purpose in forbidding sex discrimination in 1972. To the contrary, the use of language previously construed to create enforceable personal rights demonstrates congressional intent to protect individuals seeking an equal opportunity to participate in federally aided programs.¹⁴

Had Congress enacted only section 901, without any provision for administrative regulations or their enforcement, that section clearly would be enforceable in private actions. A rich legacy of judicial opinion, dating at least to *Marbury v. Madison*, 5 U.S. 137 (1803),¹⁵ supports the principle that courts will fashion remedies in order to enforce statutory rights. This principle was the basis of Mr. Justice Pitney's opinion in *Texas and Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916):

"[I]n every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage"¹⁶

See also *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 202 (1967); *Wheeldin v. Wheeler*, 373 U.S. 647, 650-52 (1963); *Texas & N.O.R.R. v. Brotherhood of*

¹³110 Cong. Rec. 7065 (1964) (statement of Senator Ribicott).

¹⁴See *Bossier Parish School Board v. Lemon*, 370 F.2d at 852.

¹⁵In *Marbury*, Mr. Chief Justice Marshall looked to the heritage of the common law for the "general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." 5 U.S. at 163, quoting 3 Blackstone, *Commentaries* at 23.

¹⁶241 U.S. at 39, quoting *Holt*, C.J., 6 Mod. 26, 27.

Ry. & S.S. Clerks, 281 U.S. 548, 562-67 (1930); *Pollard v. Bailey*, 87 U.S. 520, 527 (1874).

This principle is stated even more forcefully in decisions involving the protection of important personal rights. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946). In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392 (1971), the Court relied on this principle in permitting private actions to protect the citizen's "absolute right to be free from unreasonable searches and seizures" proscribed by the Fourth Amendment.

This Court's decision in *Allen v. State Board of Education*, 393 U.S. 544 (1969), involved the application of this principle to a provision virtually identical to section 901.¹⁷ Section 5 of the Voting Rights Act of 1965 provides that "no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5]." 393 U.S. at 555. As the Court noted, "[t]he Voting Rights Act does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provision of the Act." 393 U.S. at 554-55 (footnote omitted). Nevertheless, the Court found that private actions should be allowed, in order that the statutory guarantee not "prove an empty promise." 393 U.S. at 557.¹⁸

¹⁷In his opinion on behalf of four members of this Court in *Regents of the University of California v. Bakke*, 98 S.Ct. 2733, 2809 (1978), Mr. Justice Stevens noted the clear analogy between the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1970), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1970). In support of his conclusion that the statutes imply private rights of action, he stressed that both "are broadly phrased in terms of personal rights ('no person shall be denied . . .') . . ." 98 S.Ct. at 2815 n.28.

¹⁸The Court noted that the Attorney General's "limited staff" might not be able to "uncover quickly new regulations and enactments passed

At least in the realm of individual rights, the Court's recent formulation of the implication doctrine in *Cort v. Ash*, 422 U.S. 66 (1975), is thoroughly consistent with the principle that courts will fashion remedies in order to fulfill the legislative purpose. Two of the four relevant factors identified in *Cort* are easily disposed of in consideration of a remedial civil rights statute such as Title IX. A provision stating that no person shall suffer discrimination by sex is clearly enacted for the benefit of those discriminated against; and the prohibition of sex discrimination is plainly not a subject traditionally relegated to state law or of primary concern to the states. A third relevant factor under *Cort* is evidence of legislative intent either to permit or to deny private rights of action.¹⁹ While Congress described the broad legislative purpose behind Title IX, it was less explicit with respect to section 901 private rights of action. Thus, the *Cort* analysis is reduced to the same inquiry posed in earlier decisions: do private actions serve the purpose underlying the statutory scheme?²⁰

by the varying levels of state government." 393 U.S. at 556. A year prior to *Allen*, the Court observed in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968):

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.

390 U.S. at 401 (footnote omitted).

¹⁹*Cort* stated that evidence of "an explicit purpose to deny such cause of action would be controlling." 422 U.S. at 82. A clear indication of legislative intent to allow private actions would also control.

²⁰Some commentators have called *Cort* a retrenchment from prior implication decisions, *see* authorities cited at Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378, 1380 n.15 (1978). But the statement in *Cort* that private actions should be "consistent" with the statute appears, if anything, to be less exacting than the Court's earlier rule that implied remedies be "necessary to make effective the congressional purpose." *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

That Congress passed section 901 in order to provide individuals with equal access to federally aided education could not be clearer. That section 902 procedures are inadequate to guarantee that equality of opportunity is also obvious.²¹ Denial of a private remedy under those circumstances would violate a fundamental principle of our jurisprudence and render the guarantee of section 901 "an empty promise." *Allen*, 393 U.S. at 557.

B. Section 902 Was Not Intended To Protect Personal Rights Under Section 901. It Should Not Be Construed to Preclude Private Enforcement of Those Rights.

The Seventh Circuit did not distinguish the reasoning of *Allen* or dispute that section 901 standing alone would create enforceable rights. Instead it concluded that the administrative procedures available to federal agencies under section 902 somehow negated the individual's right to seek redress in the courts. But there is no evidence, in the statute's language or its legislative history, to support this construction of section 902. The provision deals only with enforcement by agencies of their own administrative requirements. The procedures it establishes involve the relationship between the funding agency and the institutional applicant or recipient. HEW expressly denies the individual victim of sex discrimination any meaningful role in the administrative process.

In *Rosado v. Wyman*, 397 U.S. 397 (1970), this Court determined that a statutory provision authorizing agencies

²¹HEW has conceded that a judicial remedy is necessary for the enforcement of section 901 rights. HEW's view is not simply an agency opinion on a matter of law, to which this Court would generally accord little weight, see *Piper v. Chris-Craft Industries*, 430 U.S. 1, 41 n.27 (1977), but rather a statement on the factual issue of the agency's ability to process Title IX complaints, an issue on which HEW is uniquely well qualified to speak.

to terminate federal funding did not supplant or detract from private judicial remedies implied by a different statutory provision. In *Rosado* petitioners, the intended beneficiaries of state programs under the Aid to Families with Dependent Children program, were met with the argument that the courts should decline to entertain their claim in deference to such a termination process. Mr. Justice Harlan noted the existence of this administrative process, but was "most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. at 420. Because those individuals could neither participate in nor obtain their desired relief through HEW's procedures for cutting off funds, he concluded that "neither the principle of 'exhaustion of administrative remedies' nor the doctrine of 'primary jurisdiction' [had] any application to the situation" presented by their claims. 397 U.S. at 406.

Similarly in this case the Court should not rely on section 902 as the means of enforcing individual rights under section 901. Section 902 serves a more limited purpose than section 901. It establishes one method of promoting non-discrimination: funding agencies are directed to ensure compliance with their administrative regulations through encouragement, threat, and if necessary cessation or denial of federal aid. It is clear without reference to the practical effectiveness of these procedures that they cannot prevent violations of the absolute ban of section 901. Over time recourse to the ultimate sanction of funding cut-offs may have the prophylactic effect of discouraging future discriminatory practices, but in the interim the injuries suffered by individual victims of sex discrimination are likely to remain unredressed. Under section 902 procedures a woman unlawfully excluded from federally supported programs cannot force a fair reconsideration of her application, the one effective remedy for her injury. Voluntary compliance, if achieved, may come too late to provide meaningful relief and may not address her particular case.

The only solid protection afforded by section 902 runs to recipients of federal funds. Those procedures do not prohibit sex discrimination, only arbitrary action taken to correct it. If they are the sole method of enforcing section 901, that section is not the absolute guarantee that its words state.

II. TITLE VI HAS BEEN CONSTRUED TO IMPLY AN ENFORCEABLE PRIVATE RIGHT OF ACTION. TITLE IX SHOULD RECEIVE THE SAME CONSTRUCTION.

That Congress intended Title IX to be enforced in precisely the same manner as Title VI is beyond dispute. Senator Bayh stated that Title IX's enforcement powers were "parallel to those found in title VI of the 1964 Civil Rights Act."²² The language of the two statutes is virtually identical, and the legislative history of Title IX demonstrates that the parallel was purposeful. The deliberate duplication of Title VI is a strong indication of legislative intent that Title IX be interpreted in the same way. *Northcross v. Memphis Board of Education*, 412 U.S. 427 (1973) (per curiam).²³

²²118 Cong. Rec. 5803 (1972).

²³*Northcross* involved interpretation of statutory language that had been construed previously in interpreting another civil rights statute. The Court stated:

The similarity of language in § 718 [of the Attorney's Fees Awards Act] and § 204(b) [of the Civil Rights Act of 1964] is, of course, a strong indication that the two statutes should be interpreted *pari passu*. Moreover, "the two provisions share a common *raison d'être*. The plaintiffs in school cases are 'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose — 'to encourage individuals injured by racial discrimination to seek judicial relief' " *Johnson v. Combs*, 471 F.2d 84, 86 (CA5 1972) [*cert. denied*, 413 U.S. 922 (1973)], quoting *Newman v. Piggie Park Enterprise, Inc.*, *supra*, at 402.

412 U.S. at 428. On this reasoning the Court concluded that the language common to the two statutes should be interpreted consistently.

Section 601 consistently has been interpreted to authorize private actions on behalf of victims of discrimination. *E.g.*, *Lau v. Nichols*, 414 U.S. 563, 566 (1974); *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967). In fact, "[t]o date the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI." *Regents of the University of California v. Bakke*, 98 S.Ct. 2733, 2814 (1978) (Opinion of Mr. Justice Stevens). Over the course of 14 significant years of judicial decisions the right of victims of ethnic discrimination to seek redress in the courts has been firmly established.²⁴

Mr. Justice White has suggested in his concurring opinion in *Bakke* that Congress, by implication, denied the

²⁴See also *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Uzzell v. Friday*, 547 F.2d 801, *modified*, 558 F.2d 727 (4th Cir. 1977) (*en banc*), *vacated and remanded*, 98 S.Ct. 3139 (1978); *Garret v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974); *Serna v. Portales Mun. Schools*, 499 F.2d 1147 (10th Cir. 1974); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); *Alvarado v. El Paso Independent School Dist.*, 445 F.2d 1011 (5th Cir. 1971); *Pabon v. Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976); *Otero v. Mesa County Valley School Dist.*, 408 F. Supp. 162 (D. Colo. 1975), *vacated and remanded*, 568 F.2d 1312 (10th Cir. 1977); *Player v. State Dep't. of Pensions*, 400 F. Supp. 249 (M.D. Ala. 1975), *aff'd*, 536 F.2d 1385 (5th Cir. 1976); *Natonabah v. Board of Educ.*, 355 F. Supp. 716 (D. N.M. 1973); *Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248 (N.D. Cal. 1972); *Southern Christian Leadership Conference Inc. v. Connolly*, 331 F. Supp. 940 (E.D. Mich. 1971); *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969).

The Seventh Circuit's attempt to distinguish this line of authorities by suggesting that each of the cases "arose under 42 U.S.C. § 1983" rests on an inaccurate interpretation of the decisions. 559 F.2d at 1082 n.6. For example, in *Lau v. Nichols*, 414 U.S. 563, this Court relied "solely on § 601 of the Civil Rights Act of 1964" in granting plaintiffs' relief. 414 U.S. at 566. Similarly, *Hills v. Gautreaux*, 425 U.S. 284 (1976), was grounded on the Fifth Amendment and section 601; since it was brought against federal officials for violation of federal law, it could not have been brought under § 1983. See also *Bossier Parish School Board v. Lemon*, 370 F.2d 847; *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489.

private right to sue under Title VI of the Civil Rights Act because it expressly provided for a private right to sue under Titles II and VII of the same Act.²⁵ But Title II, prohibiting discrimination in places of public accommodation, and Title VII, proscribing employment discrimination, establish procedural qualifications on the exercise of private rights of action.²⁶ Moreover, each title specifically delimits the remedies available under it.²⁷ In these circumstances it is reasonable to conclude that

²⁵98 S.Ct. 2733, 2795 (1978). The suggestion of Mr. Justice White is based on the ancient maxim *expressio unius est exclusio alterius*. In 1943 the Court suggested that this principle had "long . . . been subordinated to" less mechanical interpretive methods sensitive to "the generally expressed legislative policy." *S.E.C. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) (footnote omitted). In addition, the usefulness of the principle is undermined by decisions of this Court recognizing implied judicial remedies under certain provisions of a statute in the face of express judicial remedies under other provisions. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

²⁶Title II requires notification of appropriate officials whenever state or local law applies and authorizes deference to pending state or local enforcement proceedings. 42 U.S.C. § 2000a-3(c) (1970). Where no other law applies, federal courts may refer complaints to the Community Relations Service established by Title X for initial attempts at voluntary compliance. 42 U.S.C. § 2000a-3(d) (1970). Title VII requires prior resort to state or local remedies and permits federal court actions only when a complaint has been filed with the Equal Employment Opportunity Commission and the Commission has been unable to secure voluntary compliance. 42 U.S.C. § 2000e-5 (1970).

²⁷Title II authorizes a person aggrieved to file "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order." 42 U.S.C. § 2000a-3(a) (1970). Under Title VII a "court may enjoin the respondent from engaging in [an] unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without backpay." 42 U.S.C. § 2000e-5(g) (1970). This latter provision was amended in 1972 to allow courts in addition to order "any other equitable relief as the court deems appropriate." P.L. 92-261.

Congress dealt specifically with private rights of action in Titles II and VII in order to delimit rights otherwise available by implication under the rule of *Rigsby*, rather than as part of a plan to exclude private actions except where explicitly authorized. Indeed, Congress might well have decided to make judicial remedies under Title VI more fully available. Titles II and VII use the full sweep of the commerce power to reach myriad individuals and enterprises which have not voluntarily submitted themselves to federal jurisdiction. By contrast, Title VI rests upon the straightforward principle that institutions which voluntarily accept federal funds should not administer them in violation of federal law and policy against ethnic discrimination. Senator Ribicoff, one of the chief sponsors of the 1964 Act, noted that while "opponents of the bill ha[d] frankly expressed their [contrary] view" on other provisions,

The principle of nondiscrimination in the use of Federal funds is so undeniably sound that to my knowledge there has not been one word said in opposition to this principle during the debate on this bill.

110 Cong. Rec. 7064 (1964).

There is no valid basis for according section 901 an interpretation different from Title VI. Congress certainly was aware that a private right of action had been inferred from section 601 when eight years later it repeated the language of that provision in section 901: the draftsmen and sponsors of section 901, legislators well informed of developments in civil rights law, did not act in ignorance of decisions such as that in *Bossier*. They knew how to preclude private actions and could easily have done so had that been their intention.²⁸ Congress has subsequently demonstrated its

²⁸Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102 (Supp. V, 1975), prohibits age discrimination in federally funded

awareness of the many decisions authorizing private actions under section 601 and similarly worded statutes, and has adverted to them with approval.²⁹

CONCLUSION

The fundamental civil rights of the individual granted by Constitution or statute are less than vital if they are no more than a statement of policy guiding the elusive discretion of a massive bureaucracy in the administration of "sophisticated schemes." Judicial remedies are more important than abstract principles.

That courts will fashion appropriate judicial remedies to protect statutory rights is central to our jurisprudence. And nowhere is the courts' role more important than in the protection of basic individual rights. The right of all citizens to equal access to federally aided programs has been clearly established. This Court and other courts repeatedly have entertained private lawsuits in order to

programs in language deliberately modeled on that in Title VI and Title IX. However, the Age Discrimination Act specifically provides that procedures identical to those in section 602 and section 902 "shall be the exclusive remedy for the enforcement of the provisions of this chapter." 42 U.S.C. § 6104(e) (Supp. V, 1975).

²⁹In enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, Congress clearly expressed its understanding that Titles VI and IX could be privately enforced. *See, e.g.*, 122 Cong. Rec. S16,252, S16,262, S16,268, (daily ed. Sept. 21, 1976) (remarks of Sens. Kennedy and Allen, sponsors); 122 Cong. Rec. S16,431 (daily ed. Sept. 22, 1976) (remarks of Sen. Hathaway); 122 Cong. Rec. H12,155, H12,159, H12,164-65 (daily ed. Oct. 1, 1976) (remarks of Reps. Seiberling, Drinan, Holtzman, and Bauman). Congress expressed the same understanding concerning Title VI in the debates on the Emergency School Aid Act of 1972, 20 U.S.C. §§ 1601, 1617. *See* 117 Cong. Rec. S11,528, S11,726 (daily ed. April 22, 1971) (remarks of Sen. Cook, sponsor).

The legislative history of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, also indicates congressional understanding that Title VI and IX "permit[ted] a judicial remedy through a private action." S. Rep. No. 1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Adm. News 6373, 6391.

remedy ethnic discrimination prohibited by Title VI of the Civil Rights Act. The Seventh Circuit's position on Title IX of the Education Amendments would undermine that established line of authority; more important, it would signal a retreat from the fundamental rule that courts should protect every right with a meaningful remedy. In the sensitive area of discrimination, where bitter experience demonstrates that politics, prejudice, and sheer inertia are continuing intruders, the independent judgment of the courts must be available to the victim of unequal treatment.

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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No. 77-926

GERALDINE G. CANNON, *Petitioner,*

v.

THE UNIVERSITY OF CHICAGO, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

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AS AMICUS CURIAE**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON, *Petitioner*,

v.

THE UNIVERSITY OF CHICAGO, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

**BRIEF FOR THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
AS AMICUS CURIAE**

This brief is submitted with the written consent of
counsel to all parties filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes former Attorneys General, past Presidents of the American Bar Association, former Solicitors General, a number of law school deans, and many of the nation's leading lawyers. Through its

national office in Washington, D.C., and its offices in Jackson, Mississippi and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in education, employment, voting, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee and its local committees, affiliates, and volunteer lawyers have been actively engaged in providing legal representation to those seeking relief under federal civil rights legislation. That litigation includes cases raising issues similar to those presented here. The Committee for many years has also dealt with various federal agencies, including the Department of Health, Education and Welfare, and, as a result, has a great deal of knowledge and expertise concerning the legislation the Department seeks to enforce, and the effectiveness of its efforts. Further, the Lawyers' Committee has a Federal Education Project (which is privately funded) that seeks, among its goals, to insure that Title IX of the Education Amendments of 1972 is comprehensively implemented. Our interest in this case therefore is two-fold: first, and generally, to assist citizens in having their claims for civil rights adjudicated in federal courts, whenever necessary; and second, more particularly, to insure the full recognition of individual rights under Title IX.

This case involves the claim of a private citizen that she was denied admission because of her sex to medical schools which receive federal financial assistance. Several years have passed since she was refused admittance and no court or federal agency has yet ruled on the merits of her Title IX claim. The Department

of HEW acknowledges that administrative enforcement alone of Title IX is insufficient to enforce the statute. Yet, the court of appeals ruling in this case is that there is no private right of action under Title IX. Therefore, if the court of appeals ruling is allowed to stand, private citizens, such as the petitioner, are without recourse to a timely determination of their claims of discrimination. The consequence of no timely determination will ordinarily mean the loss of the opportunity or benefit in question—here the opportunity to attend medical school.

Unless the court of appeals ruling is reversed, our efforts, particularly the efforts of our Federal Education Project, to see that the rights created by Title IX are enjoyed by all persons will be seriously undermined. In addition, unless the court of appeals ruling is reversed, the congressional recognition of the concept of "private attorneys general", often approved by this Court, would be undermined. Finally, *amicus* believes that unless the ruling is reversed, Title IX will be reduced to a pious statement, largely unenforceable. As an organization that was established to increase private efforts to end discrimination we have a vital interest in the outcome of this case, and, therefore, the Lawyers' Committee files this brief as friend of the Court urging reversal.

SUMMARY OF ARGUMENT

Title IX was enacted to assure to all persons the right to participate in federally assisted education programs without being subjected to discrimination on the basis of sex.¹ In enacting Title IX, Congress gave specific enforcement responsibilities to the Attorney Gen-

¹ Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, 20 U.S.C. §§ 1681 *et seq.* (Supp. V 1975).

eral and to federal departments and agencies. It did not expressly authorize victims of discrimination to bring private enforcement actions. In connection with similar civil rights legislation, this Court has repeatedly recognized that private enforcement suits to vindicate personal rights are consistent with and necessary supplements to administrative enforcement. The decision of the court of appeals denying a private right of action under Title IX cannot be squared with the prior decisions of this Court.

The protection of civil rights is not a responsibility entrusted to the peculiar competence of administrative agencies but is rather one in which the courts have traditionally played a leading role. Private enforcement actions are particularly appropriate here where the administrative enforcement mechanisms do not entitle the victim of discrimination to compel investigations, to participate as a party in administrative proceedings, or to appeal adverse decisions. Moreover, the administrative finding of discrimination characteristically triggers only the cutting off of federal funds, an action which affords no relief to individual victims of discrimination. Finally, as the Department of Health, Education and Welfare ("HEW") itself concedes, practical experience with administrative enforcement has shown it to be inadequate to enforce the prohibitions of Title IX.

ARGUMENT

I. INTRODUCTION

In comprehensive language which applies, *inter alia*, to admissions to professional and graduate schools,²

² 20 U.S.C. § 1681(a)(1) (Supp. V 1975) provides that "in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education"

§ 901 of Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance" 20 U.S.C. § 1681 (Supp. V 1975). Petitioner Geraldine G. Cannon brought this action to enforce Title IX's prohibitions. Specifically, she alleged that respondents The University of Chicago and Northwestern University discriminated on the basis of sex in violation of her rights under Title IX when they rejected her applications for admission to medical school.³ Neither the district court⁴ nor the court of appeals⁵ reached the merits of her claims, because each refused to recognize a private right of action under Title IX.⁶

³ The complaint also alleged that petitioner's rights were violated under the Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1970); the Age Discrimination in Employment Act, § 2, 29 U.S.C. § 621 (1970); and the Public Health Services Act, § 799A, 42 U.S.C.A. § 292d (West Supp. 1974-77). Certiorari was sought only with respect to whether there is an implied private right of action under Title IX, Petition for a Writ of Certiorari 3, and was granted on July 3, 1978. 98 S.Ct. 3142 (1978).

⁴ 406 F. Supp. 1257 (N.D. Ill. 1976).

⁵ 559 F.2d 1063 (7th Cir. 1976), *aff'd on rehearing*, 559 F.2d 1077 (7th Cir. 1977).

⁶ The court of appeals did state that "it would have been unfair to admit plaintiff to the class ahead of at least the 2000 other applicants who had better academic records". 559 F.2d at 1067 n.2. The bluntness of this statement suggests that the court's view of the merits of petitioner's case may have infected its conclusion that Title IX does not afford a private right of action. The fact that this petitioner may ultimately fail to establish unlawful discrimination is, of course, no warrant for denying her an opportunity to prove her case nor is it a justification for denying a private right of action to others who may clearly be victims of discrimination.

Thus the only issue now before this Court is whether the courts below erred in refusing to allow the victim of discrimination to bring suit.⁷

The considerations relevant to "determining whether a private remedy is implicit in a statute not expressly providing one", *Cort v. Ash*, 422 U.S. 66, 78 (1975), can best be reviewed by answering the four questions posed in *Cort*:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff?

* * *

Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?

* * *

Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

* * *

And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? 422 U.S. at 78 (citations omitted).

⁷ If private actions are authorized to enforce the prohibitions of Title IX, district courts have jurisdiction to hear them under 28 U.S.C. § 1343(4), which establishes jurisdiction over civil actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights" *Jones v. The American University, et al.*, CA No. 78-565, slip op. at 6 (D.D.C., July 27, 1978). Cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.1 (1968) (Civil Rights Act of 1866); *Allen v. State Bd. of Elections*, 393 U.S. 544, 554 (1969) (Voting Rights Act of 1965). See also 1 Moore's Federal Practice ¶ 0.62[9], at 700.21 (2d ed. 1977) (Title VI of the Civil Rights Act of 1964).

Amicus submits that the answers to those questions⁸ confirm that Title IX is precisely the sort of statute which should give rise to a private right of action.⁹

II. TITLE IX CREATES A FEDERAL RIGHT TO EQUAL EDUCATIONAL OPPORTUNITIES IN FAVOR OF PETITIONER

The legislative history of Title IX makes clear that it was intended to protect those who had been or might be subjected to sex discrimination in federally assisted programs of higher education.

⁸ A private enforcement action under Title IX is manifestly not a cause of action "traditionally relegated to state law", *Cort v. Ash*, 422 U.S. at 78, both because Title IX extends only to programs supported by federal funding and because the federal government historically has undertaken the principal responsibility for combatting discrimination. Cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (sustaining, over an Eleventh Amendment challenge, the award of a "reasonable attorney's fee" pursuant to 42 U.S.C. 2000e-5(k) against a state found to have engaged in employment discrimination on the basis of sex).

⁹ Several lower courts have sanctioned private enforcement actions under Title IX itself. *Jones v. The American University, et al.*, CA No. 78-565 (D.D.C. July 27, 1978) (Oberdorfer, J.) (denying motion to dismiss claim by female student of multiple discriminatory acts); *Piascik v. Cleveland Museum of Art*, 426 F. Supp. 779 n.1 (N.D. Ohio 1976) (expressly recognizing private right of action under Title IX where female job applicant alleged discrimination in refusal to hire); *Trent v. Perritt*, 391 F. Supp. 171 (S.D. Miss. 1975) (implicitly recognizing private right of action where male public school student was permitted to argue that hair length code discriminated against him in violation of Title IX); *Alexander v. Yale University*, No. N-77-277 (D. Conn. Dec. 21, 1977) (denying motion to dismiss claim by female students alleging sexual harassment by male faculty members in violation of Title IX); *Grossman v. Texas Tech Union*, No. CA-5-77-23 (N.D. Tex. Nov. 18, 1977) (denying motion to dismiss private action under Titles VI and IX).

In introducing Title IX in the Senate, Senator Bayh stated that "we are attempting to establish access to higher education as a basic Federal right." 117 Cong. Rec. 30155 (1971). Much of the debate focused on admissions because "the area where discrimination affects the greatest number of women is in admissions" 118 Cong. Rec. 5805 (1972) (remarks of Senator Bayh). Medical school admissions policies were particularly and frequently cited as among the most discriminatory against women. *See, e.g.*, 117 Cong. Rec. 30406 (1971); 117 Cong. Rec. 39248-61 (1971) (debate and passage of the Erlenborn Amendment allowing private undergraduate schools to discriminate in admission).

In short, Title IX was intended to and does confer on medical school applicants such as petitioner a federal right to be considered for admission without discrimination on the basis of sex.

III. IMPLICATION OF A PRIVATE RIGHT OF ACTION UNDER TITLE IX IS CONSISTENT WITH CONGRESSIONAL INTENT

The court below held that implication of a private right of action would be inconsistent with the legislative intent underlying Title IX. 559 F.2d at 1080. In reaching this result, the court both misconstrued the legislative history of Title IX and misapplied the intent criterion of *Cort* to the legislative history.

The legislative history of Title IX contains no expression of support for or opposition to private rights of action, and thus no definitive understanding of congressional intent is possible. However, a brief review of related statutes demonstrates that a private right of action under Title IX is at least consistent with congressional intent.

The prohibitory language and the remedies of Title IX were patterned explicitly on those of Title VI of the Civil Rights Act of 1964.¹⁰ When Title IX was enacted in 1972, several courts had recognized implied private rights of action under Title VI.¹¹ As the court below acknowledged, the legislative history of Title IX gives no indication that Congress intended either to overturn or to adopt this line of cases in connection with Title IX.¹²

¹⁰ *See, e.g.*, comments of Senator Bayh in support of Title IX: Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by Title VI of the Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibitions and enforcement provisions which generally parallel the provisions of Title VI. 118 Cong. Rec. 5807 (1972).

¹¹ *E.g.*, *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir. 1967), *cert. den.*, 388 U.S. 911; *Gautreaux v. Chicago Housing Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967). The court below distinguished this line of cases by stating that the decisions do not affirmatively establish the existence of an implied private right of action under Title VI. Commenting on *Bossier* in particular, the court said:

We suspect that even the cases that do not expressly mention Section 1983 were in fact brought under that statute, for all the cases cited to us appear to have been brought against public agencies acting under color of state law. 559 F.2d at 1082 n.6.

Yet, the court in *Bossier* specifically held:

Consequently, plaintiffs are entitled to bring this class action either under Section 601 of the Civil Rights Act of 1964 or under the contractual assurances by which the defendants are estopped to deny them the same rights to attend desegregated schools as are possessed by children of Negro residents of Bossier Parish. 370 F.2d at 851 (emphasis added).

Thus, the Fifth Circuit seems clearly to have recognized a private right of action under Title VI.

¹² 559 F.2d at 1082.

By 1976, when Congress enacted the Civil Rights Attorney's Fees Award Act ("Attorney's Fees Act"),¹³ it was fully aware of the progress of litigation concerning private actions under Titles VI and IX. For example, Senator Scott stated in support of the Attorney's Fees Act:

Each of the provisions covered by S. 2278 relies upon private enforcement Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights.

. . . .

The enactment of S. 2278 is needed to assure that attorney's fees will be available in suits brought under the reconstruction-era civil rights laws, title VI of the 1964 Civil Rights Act, and title IX of the Education Amendments of 1972 in the same fashion and to the same extent as the statutes presently provide in cases brought under title VI of the 1964 Civil Rights Act. Mr. President, as a nation of laws, and as a government of laws, we should welcome citizen suits which succeed in enforcing laws. 122 Cong. Rec. S 16251 (daily ed. Sept. 21, 1976).

Other Members of Congress, however, took pains to avoid any implication that the Attorney's Fees Act was intended to alter the course of pending litigation:

It has been brought to my attention that by granting attorneys' fees to prevailing parties other than the United States, Congress might implicitly authorize a private right of action under title VI and title IX. This is not the intent of Congress. This bill merely creates a remedy in the event the courts determine that an individual may sue under these statutes. 122 Cong. Rec. H 12161 (daily ed. Oct. 1, 1976) (comments of Rep. Railsback).

¹³ P.L. 94-559, 90 Stat. 2641, 42 U.S.C.A. § 1988 (West Supp. 1974-77).

The court of appeals assigned a mistaken significance to the substantially silent legislative history of Title IX and to the studied neutrality reflected in the deliberations surrounding the Attorney's Fees Act. *Cort* instructs not that private rights of action must be denied unless Congress affirmatively prescribes them—in such a case *Cort's* analytical framework would be superfluous—but rather that courts satisfy themselves that Congress did not intend to preclude private causes of action:

[I]n situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling. 422 U.S. at 82.

The legislative history of Title IX satisfies this criterion. While it may not demonstrate an affirmative intent to create private rights of action, at the very least it demonstrates that Congress did not intend to deny such rights, which is all that *Cort* requires.

IV. A PRIVATE RIGHT OF ACTION WOULD SERVE THE UNDERLYING PURPOSE OF TITLE IX

The inconclusive evidence regarding congressional intent to grant a private right of action makes critical the question whether private actions would serve or disserve the overall purpose of Title IX—to ensure that applicants to medical schools, among others, are accorded fair treatment without discrimination on the basis of sex. Yet the court of appeals wholly failed to address the relationship of private actions to that purpose. Instead the court below appears to have relied on the mere existence of an administrative enforcement

mechanism as a basis for refusing to allow private actions.¹⁴ This wooden approach has been rejected by this Court, which has regularly allowed private actions as supplements to administrative enforcement when such actions would serve the underlying purposes of the legislation. In the present case, careful review of the purpose of Title IX and of its administrative enforcement mechanism demonstrates that private enforcement actions would contribute importantly to eliminating sex discrimination from federally assisted education programs.

A. A Private Right of Action Is Appropriate to Vindicate Civil Rights Such as Those Created by Title IX

Title IX establishes a strong personal right against discriminatory treatment, in the tradition of federal legislation barring discrimination in voting, employment, housing and other significant areas. Decisions of this Court and the lower federal courts have recognized the important role played by private enforcement actions in translating broad statutory prohibitions into meaningful protection for individuals.¹⁵ When Congress has created such rights "[i]t is for federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded". *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946).

In *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), the Court held that black railroad firemen may seek

¹⁴ 559 F.2d at 1073-74.

¹⁵ See Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 Yale L.J. 1378 (1978).

injunctive relief against an agreement between the railroad and their union, which together had discriminated against the firemen. Since the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. §§ 151 *et seq.*, provided that only the union could bring complaints before the Railroad Adjustment Board, the firemen were left without a mechanism to vindicate their right to fair representation. "That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction." 323 U.S. at 207. See also *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944).

The same concern led the Court in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), to recognize a private right of action to enforce § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. §§ 1973 *et seq.* While the Voting Rights Act, like Title IX, did "not explicitly grant or deny private parties authorization" to bring private actions, 393 U.S. at 554, it provided that "no person shall be denied the right to vote" for failure to comply with state or local voting laws not yet approved by the Attorney General or the federal district court for the District of Columbia. 393 U.S. at 555. The Court held that the guarantee of § 5 "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 557.¹⁶

¹⁶ This philosophy was also expressed in a different context in *Rosado v. Wyman*, 397 U.S. 397 (1970), which held that welfare recipients could bring private actions to challenge state welfare plans as violative of § 402(a)(23) of the Social Security Amendments of 1967, 42 U.S.C. § 602(a)(23) (1970). The Court there stated that "[w]e are most reluctant to assume Congress has

In *Lau v. Nichols*, 414 U.S. 563 (1974), the Court held that the failure of the San Francisco school system to provide English language instruction for Chinese-speaking students violated Title VI of the Civil Rights Act of 1964, which bars discrimination "on the ground of race, color, or national origin" in federally funded activities. 42 U.S.C. § 2000d (1970). By deciding the merits of the case in favor of the students, the Court must necessarily have concluded that they were entitled to bring such a private enforcement action.¹⁷

That *Lau* recognized a private right of action under Title VI was confirmed in *The Regents of The University of California v. Bakke*, 98 S.Ct. 2733 (1978), in which four Justices concluded that Title VI affords a private right of action. 98 S.Ct. at 2814-5 (Opinion of Justice Stevens, concurring in the judgment in part and dissenting in part). Four other members of the Court assumed for the purposes of the case that Title VI affords a private right of action. 98 S.Ct. at 2745 (Opinion of Justice Powell); 98 S.Ct. at 2768 (Opinion of Justice Brennan, concurring in the judgment in

closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. at 420.

¹⁷ Justice Blackmun, in concurrence, noted that the case involved 1,800 students and recorded his view that, in a case involving only one or a very few students, he "would not regard today's decision, or the separate concurrence, as conclusive upon the issue of whether the statute and the guidelines require the funded school district to provide special instruction." 414 U.S. at 572. Justice Blackmun's language makes it plain that his reservation was addressed to the standards for determining discrimination and to the appropriate relief after a finding of discrimination, and not, as the court of appeals concluded, 559 F.2d at 1072, to whether one or a few students could bring a private enforcement action.

part and dissenting). The Opinion of Justice Stevens analyzed Title VI in detail and observed that:

The analogy to the Voting Rights Act of 1965, 79 Stat. 437, is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. 98 S.Ct. at 2815 n.28.

Title IX creates personal rights against discrimination closely analogous to those created by § 5 and Title VI.¹⁸ The unequivocal language of § 901 bears repeating: "No person in the United States shall, on the basis

¹⁸ Private rights of action have been implied under several other statutes conferring personal rights. *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956) (implying a private right of action under 49 U.S.C. § 484(b), a provision of the Civil Aeronautics Act prohibiting air carriers from discriminating unjustly); *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967) (discussed in note 11, *supra*).

The courts have also implied a private right of action under Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. § 794 (Supp. V 1975), which prohibits discrimination against otherwise qualified handicapped persons. It was modelled after Title VI and Title IX:

Section 504 is patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 . . . and section 901 of the Education Amendments of 1972. 1974 U.S. Code Cong. & Admin. News 6390.

In *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977), two "mobility-disabled" individuals on behalf of a class of all such persons in northeastern Illinois sued two mass transportation systems alleging that they were unable to use defendants' systems. Noting that Section 504 closely tracks the language of Title VI, the court implied a private right of action under Section 504 on the authority of *Lau v. Nichols*, *supra*. 548 F.2d at 1280. *Amicus* does not believe that the lower court's purported distinc-

of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any federally assisted education program. The legislative purpose to protect *persons* from discrimination would be served by allowing private rights of action under Title IX.

In contrast, private actions would not have served statutory purposes or would have served one purpose only at the expense of another in the cases which have declined to recognize private rights of action. *Cort v. Ash, supra*, held that a shareholder could not bring a derivative suit to recover corporate funds illegally used in a federal election, because "the existence or non-existence of a derivative cause of action for damages would not aid or hinder [the legislation's] primary goal [of reducing the impact of corporate funds on federal elections]." 422 U.S. at 85. *Piper v. Chris Craft Industries, Inc.*, 430 U.S. 1 (1977), held that to imply a private right of action in favor of unsuccessful tender offerors could not serve the objectives of the Williams Act, because the "sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." 430 U.S. at 35.

Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978), concerned an allegation under Title I of the

tion of *Lloyd* can be sustained in the face of the demonstrated inadequacy of HEW's efforts to enforce Title IX.

This Court also implicitly recognized a private right of action under Section 504 in *Campbell v. Kruse*, 434 U.S. 808 (1977). In *Campbell*, handicapped children and their parents challenged Virginia statutes which allegedly discriminated by not providing public school services to such children on the same basis as other children. A three judge court held for the plaintiffs on equal protection grounds. 431 F. Supp. 180 (E.D. Va. 1977). On appeal, the Court vacated and remanded with express directions to the district court to decide the claim based on section 504.

Indian Civil Rights Act of 1968 ("ICRA")¹⁹ that tribal authorities had discriminated on the basis of sex in determining membership in the tribe. The Court, through Justice Marshall, refused to recognize a private right of action because it would constitute a judicial intrusion into tribal sovereignty, which takes precedence if Congress has not expressly granted a private right of action. Noting that "we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms", 98 S.Ct. at 1678, the Court contrasted the single purpose of most civil rights statutes with the dual purpose of the ICRA and concluded that:

[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. 98 S.Ct. at 1680.²⁰

In contrast, Title IX has the clear, unitary purpose of prohibiting discrimination on the basis of sex, a purpose which private enforcement actions would serve.

¹⁹ 25 U.S.C. §§ 1301-03 (1970).

²⁰ *Brown v. General Services Administration*, 425 U.S. 820 (1976), upon which the university respondents rely, Opposition to Petition for Writ of Certiorari 7, concerned Section 717 of the Civil Rights Act of 1964. Section 717 provides that an aggrieved federal employee may file an administrative complaint alleging discrimination and, after an adverse administrative decision, may file a complaint in federal district court within thirty days. The court properly held that a tardy plaintiff could not circumvent the thirty-day limitation through "artful pleading" of an implied private right of action different from the private right of action delineated by Congress. *Brown* thus is not instructive with respect to Title IX, in which Congress did not specify the terms and conditions of a private right of action.

B. A Private Right of Action Would Complement Inadequate Administrative Enforcement

In both design and performance, administrative enforcement falls far short of honoring § 901's guarantees. Title IX directs each department or agency "which is empowered to extend Federal financial assistance to any education program or activity . . . to effectuate the provisions of [§ 901] with respect to such program or activity by issuing rules" 20 U.S.C. § 1682 (Supp. V 1975). If a recipient of federal assistance violates such a rule, the department may, after a hearing, terminate or refuse to grant or continue assistance or may use "any other means authorized by law . . ." to secure compliance. *Id.* However, the department may not act before determining that "compliance cannot be secured by voluntary means", *id.*, and any person aggrieved by the termination of funding may obtain judicial review. 20 U.S.C. § 1683 (Supp. V 1975).

Under regulations issued by HEW,²¹ which provides financial assistance to the medical schools of respondent universities, a person who feels that he or she has been subjected to discrimination may file a complaint with HEW.²² If HEW's Office for Civil Rights investigates and finds discriminatory practices which the

²¹ HEW regulations implementing Title IX are set forth at 45 C.F.R. Part 86 (1976). HEW's procedures for enforcing Title VI of the Civil Rights Act of 1964, set forth at 45 C.F.R. §§ 80.6-80.11 and 45 C.F.R. Part 81, are incorporated by reference in 45 C.F.R. § 86.71 as the procedures applicable to Title IX. Additional references in this brief to HEW's procedures will be cited directly to the Title VI provisions.

²² 45 C.F.R. § 80.7(b) (1976).

recipient refuses to correct, the recipient is entitled to an administrative hearing²³ and, in the event of an adverse determination, to judicial review.²⁴

The deficiencies of this administrative procedure as a means of vindicating the complainant's § 901 rights are striking. Except upon an extraordinary showing of agency abdication,²⁵ the complainant may not compel an investigation by the Office for Civil Rights and has no mechanism to appeal a decision by that Office not to investigate.²⁶ If an administrative hearing is convened after an investigation, the complainant is not a party to the proceeding,²⁷ and his or her participation as *amicus curiae* is subject to the discretion of the presiding officer.²⁸ Even as *amicus curiae*, the complainant has no right to introduce evidence²⁹ and may only request that questions be asked by the presiding officer, who may in his discretion grant the request only if the additional testimony "will not expand the issues".³⁰ Even if the recipient is ultimately adjudged to have engaged in discrimination on the basis of sex, the remedy imposed may not make the victim of discrimination

²³ 45 C.F.R. § 80.8(c) (1976).

²⁴ 45 C.F.R. § 80.11 (1976).

²⁵ *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) ("A consistent failure to [enforce Title VI] is a dereliction of duty reviewable in the courts.").

²⁶ See generally 45 C.F.R. § 80.8 (1976).

²⁷ 45 C.F.R. § 81.23 (1976).

²⁸ 45 C.F.R. § 81.22(a) (1976).

²⁹ 45 C.F.R. § 81.22(a) (1976).

³⁰ 45 C.F.R. § 81.22(c) (1976).

whole, either because the hearing did not adjudicate the particular facts of which the individual complained or because the educational institution chooses to accept the termination of federal funds rather than reform its practices.

The administrative enforcement of Title IX is as faulty in practice as it is in theory. HEW has admitted its failure to enforce Title IX's guarantees.³¹ Although Title IX was enacted more than six years ago, no federal funding has been terminated as a result of a Title IX violation and HEW has initiated only four administrative enforcement proceedings. The Fiscal Year 1979 Annual Operating Plan of the Office for Civil Rights predicts a backlog of 3,570 civil rights complaints on October 1, 1978, including 889 which involve allegations of sex discrimination.³² Moreover, the Attorney General has *never* instituted an action to enforce Title IX.³³ In holding that a private right of action is a "useful, and perhaps a necessary, complement" to administrative enforcement, one court recog-

³¹ Deposition of David Tatel, Director, Office for Civil Rights, taken on June 1, 1977, and filed in *Women's Equity Action League, et al. v. Califano*, C.A. No. 74-1720 (D.D.C.), at 38.

³² 43 Fed. Reg. 39262 (Aug. 18, 1978). The ineffectiveness of HEW's enforcement efforts is detailed in Sheldon & Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 Calif. L. Rev. 1121, 1153-54 (1974). See also Comment, 49 Temple L. Rev. 207, 221-11 (1975).

³³ Indeed, Title IX says nothing about the authority of the Attorney General to bring suit against private universities. Title IX amended the Civil Rights Act of 1964 to provide only that the Attorney General, upon complaint by an aggrieved student or parent, may institute civil actions against school boards and public colleges, 42 U.S.C. § 2000c-6 (Supp. V 1975), to remedy certain types of sex discrimination.

nized "the responsible agencies' present inability to effect fully the remedial purposes of the Act through administrative enforcement alone." *Jones v. The American University et al.*, CA No. 78-565, slip op. at 6 (D.D.C. July 27, 1978).

In short, administrative enforcement affords no meaningful protection to individuals. If the promise of § 901 is to be fulfilled for its intended beneficiaries, those beneficiaries must be afforded a private right of action. Finally, the Solicitor General, on behalf of HEW, supports such a private right of action as a complement to administrative enforcement which "would greatly encourage voluntary compliance with the statute's ban on sex discrimination. . . ." Brief for the Federal Respondents 14.³⁴

³⁴ See *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 n.23 (1969) ("It is significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits.").

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the judgment of the court of appeals should be reversed and the case remanded for trial on the merits.

DATED: September 15, 1978

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In the Supreme Court

MICHAEL RODAK, JR., CLERK

OF THE

United States

OCTOBER TERM, 1978

No. 77-026

GERALDINE G. CANNON,
Petitioner,

VS.

THE UNIVERSITY OF CHICAGO, et al.,
Respondents.

GERALDINE G. CANNON,
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VS.

NORTHWESTERN UNIVERSITY, et al.,
Respondents.

BRIEF AMICI CURIAE
OF

Federation of Organizations for Professional Women, League of Women Voters of the United States, National Education Law Center, National Conference of Puerto Rican Women, National Organization for Women Legal Defense and Education Fund, National Women's Political Caucus, Organization of Pan Asian American Women, Rural American Women, Sociologists for Women in Society, Women's Equity Action League, Women's Equity Action League Educational and Legal Defense Fund, American Civil Liberties Union, and Women's Legal Defense Fund

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BRIEF AMICI CURIAE OF

Federation of Organizations for Professional Women, League of Women Voters of the United States, ~~National Education Law Center~~, National Conference of Puerto Rican Women, National Organization for Women Legal Defense and Education Fund, National Women's Political Caucus, Organization of Pan Asian American Women, Rural American Women, Sociologists for Women in Society, Women's Equity Action League, Women's Equity Action League Educational and Legal Defense Fund, American Civil Liberties Union, and Women's Legal Defense Fund

INTEREST OF AMICI CURIAE

This brief is filed on behalf of the Federation of Organizations for Professional Women, League of Women Voters of the United States, ~~Center for Law and Education, Inc.~~, National Conference of Puerto Rican Women, National Organization for Women Legal Defense and Edu-

cation Fund, National Women's Political Caucus, Organization of Pan Asian American Women, Rural American Women, Sociologists for Women in Society, Women's Equity Action League, Women's Equity Action League Educational and Legal Defense Fund, American Civil Liberties Union, and Women's Legal Defense Fund, with the consent of the parties as provided in Rule 42 of the Rules of this Court.

These organizations share a concern that individuals be free to participate in all facets of American life without discrimination on the basis of gender. Central to the effort to secure equal rights for women is the establishment of an educational system which is itself free from gender-based bias. Title IX is one of the most important tools available to combat sex discrimination in educational institutions. To preclude private rights of actions under Title IX would be to eliminate a critical means for securing compliance with the law.

SUMMARY OF ARGUMENT

I

1. The issue in this case is whether individuals may seek judicial enforcement of the right created by Title IX of the Education Amendments of 1972 to be free from gender-based discrimination by educational institutions receiving federal funds. Our approach to this issue turns principally upon the fact that § 901(a) of Title IX expressly extends its guarantees to individuals. The language used in that section—"No person in the United States shall, on the

basis of sex, . . . be subjected to discrimination under any educational program or activity receiving federal financial assistance"—directly focuses upon the rights accorded to individuals. In doing so, the statute is quite similar to the Fourteenth Amendment and to various civil rights acts extending equal protection rights to each person. The limitation contained in § 901 to federally-assisted programs is simply descriptive, in this context, of the covered institutions. It was probably included to preclude constitutional problems, and was of little practical significance by the time Title IX was passed; federal financial assistance to educational institutions was so pervasive by then that almost all schools in the country were covered.

2. The legislative history of Title IX vividly supports our contention that the central purpose of that Title was to create new personal federal rights. Title IX was passed during a period when Congress was particularly aware of, and concerned about, the inadequacy of federal constitutional and statutory protections against gender-based discrimination. Further, Congress was presented, during the hearings which preceded the passage of Title IX, with evidence of massive and pervasive discrimination against women by educational institutions. The debate on Title IX focused principally upon that evidence and upon the consequent necessity to create "a strong and comprehensive measure . . . to provide women with solid legal protection" from gender-based discrimination in education. 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh).

3. From the conclusion that Congress consciously and explicitly created in Title IX a new federal right personal

to each individual, the further conclusion that such right is enforceable in court would ordinarily follow. For, just as the availability of relief in federal courts from invasion of constitutional rights is presumed, so this Court has permitted private judicial enforcement of federal statutory rights to equal protection when the statute declaring those rights does not explicitly provide for such enforcement. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 415 n.15 (1968); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). The question, then, is whether the fact that Congress went further in Title IX than a simple declaration of rights and included, in § 902, provisions for administrative action in furtherance of those rights, requires a different result than if Congress had failed so to provide.

II

1. Comparison of the scope of the right created in Title IX with the character of the administrative enforcement established by § 902 compels the conclusion that administrative action was intended as complementary to, but not coextensive with, the guarantees of § 901.

Section 902 provides that federal departments and agencies "may" effect compliance "by termination or refusal to grant or to continue assistance" or "by any other means authorized by law;" termination must be preceded by opportunity for voluntary compliance, a full hearing, and a report to the appropriate committees of Congress. For several reasons, this enforcement mechanism is incapable of, and was not intended as, full protection of the guarantees created in § 901.

Administrative enforcement under § 902 operates only prospectively, while § 901 applies in the present to any institution "receiving" federal funds. As a result, the threat of termination does not act as a deterrent to programs who do not expect their federal assistance to continue in the future. Further, even as to those programs which do rely upon continued federal assistance, fund termination does not assure that *individual* rights will be protected. For example, if Ms. Cannon were able to prove that she was indeed denied admission to medical school because of gender-based discrimination, and the termination sanction were invoked, neither she nor others similarly situated would ever receive the medical school education they were illegally denied while federal funds were being received.

Further, § 902 is not coextensive with § 901 for another reason: it lodges enforcement authority only in federal "agencies or departments", while § 901 is not so limited. Federal funds are sometimes dispensed through entities which are not federal "agencies or departments". When they are, there would, but for private suits, be no means of enforcement at all if § 902 were exclusive.

On the other hand, § 902 does serve a function which would not have been served if § 901 stood alone. The authority to terminate federal funds because of violation of § 901 would not follow inexorably from § 901 itself; it was therefore necessary specifically so to permit. Thus, §§ 901 and 902 serve complementary but not coextensive functions, and § 902 should not be read as a limitation upon the rights created in § 901.

2. While the availability of individual judicial relief to protect § 901 rights would follow, without more, from the considerations discussed above, there are specific indications in the legislative history of Title IX, and of Title VI of the Civil Rights Act of 1964 upon which Title IX was structurally based, that Congress did not understand or intend § 902 as the sole means of enforcing the personal rights created in Title IX. First and most important, in § 11 of Title VII of the Education Amendments of 1972, the same Act of which Title IX was part, Congress provided attorneys' fees for plaintiffs in certain private enforcement actions under Title VI of the Civil Rights Act of 1964. Since Title IX was consciously modelled upon Title VI, the fact that Congress in passing the attorneys' fees provision in 1972 acted directly upon the understanding that private enforcement actions were available under Title VI must be taken as conclusive evidence that it understood that such private actions would be available under the newly-enacted, parallel provisions of Title IX.

Second, Congress in Title IX failed to foreclose private lawsuits such as third-party beneficiary actions and suits under 42 U.S.C. § 1983, derived from Title IX but not based directly upon it. This suggests that judicial enforcement of Title IX's guarantees was not considered to be inconsistent with the administrative powers established by § 902.

Third, in enacting Title VI, Congress rejected an approach which would solely have provided the enforcement authority, substituting instead the two-part structure later

followed in Title IX. A dispute which arose about the coverage of Title VI for contracts of loan and guarantee, and the resolution of that dispute, demonstrates that Congress plainly understood that the declaration of rights contained in § 601 was not limited to the right to the enforcement mechanism created in § 602. Given the intentional parallelism between Title IX and Title VI, the same conclusion follows as to §§ 901 and 902. Section 902 must therefore be viewed as an additional means of enforcement to traditional judicial powers, rather than as a substitute therefor.

III

1. The Court of Appeals erroneously viewed three recent decisions of this Court—*National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); and *Cort v. Ash*, 422 U.S. 66 (1975)—as requiring denial of personal enforcement suits under Title IX. These three cases did not involve statutes which explicitly created personal rights. To the contrary, the statutes involved in those cases were, as this Court specifically noted, designed principally to protect public interests. Therefore, in those cases the presumption of the availability of private enforcement did not arise.

2. Further, the analysis, as opposed to the result, in *Cort*, *supra*, fully supports the outcome we seek in this case. The four factors identified in *Cort* as relevant to determining whether private lawsuits may be brought to enforce federal statutes all argue strongly in favor of a

private cause of action under Title IX. In deciding otherwise, the court below misunderstood the role of statutory construction principles in a case of this kind, and misunderstood as well the complementary interface between private enforcement actions and proceedings under § 902 of Title IX.

3. Finally, there are three decisions of this Court—*Rosado v. Wyman*, 397 U.S. 397 (1970); *Allen v. Board of Elections*, 393 U.S. 544 (1969); and *Calhoon v. Harvey*, 379 U.S. 134 (1964)—which, taken together, do control the disposition of this case. In *Allen* and *Calhoon*, the statutes did create personal rights. In *Allen*, the Court permitted private enforcement without inquiring into whether such enforcement was specifically intended by Congress, while in *Calhoon*, a private cause of action was denied only because Congress expressly so provided. And, in *Rosado*, the Court permitted private enforcement actions despite the existence of a fund termination mechanism quite similar to that contained in § 902, stressing that the resolution of disputes concerning guarantees attached to the expenditure of federal funds is “peculiarly part of the duty of this tribunal.” 397 U.S., at 423.

Thus, these three cases, unlike the three quite different cases relied upon below, involve statutes quite similar to Title IX, and require that individuals be permitted to enforce in court the rights Congress guaranteed each person when it enacted Title IX.

ARGUMENT

I

Section 901 of the Act Directly Creates Personal Rights Which Federal Courts May Enforce.

The issue in this case is whether individuals may seek judicial enforcement of the protection against gender-based discrimination extended by Title IX of the Education Amendments of 1972. In our view, the answer to that question turns principally upon the fact that § 901 of Title IX, a section separate from the later provisions of the Title that concern administrative enforcement powers, expressly extends its guarantees to individuals, and does so in language similar to that used in the Fourteenth Amendment and in various civil rights acts long construed to create personal rights. The legislative history of Title IX makes clear that the decision to create new personal federal rights was quite conscious. The debate on Title IX focused primarily upon the lack of effective constitutional and statutory protection against gender-based discrimination, the evidence of massive and pervasive sex discrimination by educational institutions, and the consequent need to extend to each individual a right to be free from such discrimination by programs receiving federal funds. Since Congress consciously and explicitly created in Title IX a new federal right personal to each individual, the conclusion that such right should be presumed to be enforceable in federal court follows. For, this Court has traditionally permitted actions to enforce personal federal rights even

where the constitutional or statutory provision creating that right does not expressly so permit.

1. *The Personal Rights Language of § 901.* The first section, § 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C., § 1681(a), declares in sweeping terms that:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . ."

This language, appears on its face to be a broad declaration of personal rights. It directs that "*no person*" shall be subject to discrimination, thus focusing directly upon the rights of individuals. Since "the guarantees of the [statute] extend to persons . . . the 'rights created are, by its terms, guaranteed to the individual. The rights established are personal rights.'" *Regents of University of California v. Bakke*, _____ U.S. _____, 46 U.S.L.W. 4896, 4901 (1978) (Opinion of Powell, J.), quoting *Shelley v. Kraemer*, 334 U.S. 22 (1948); see also *Bakke, supra*, 46 U.S.L.W., at 4935, n.19 (Opinion of Stevens, J.).

Moreover, as this Court has recently noted, prohibitions against discrimination are necessarily peculiarly focused upon individuals. Such prohibitions "preclude treatment

¹While the remaining subsections of § 901(a), some of which were added in 1974 (Pub. Law 93-568, § 3(a), Dec. 31, 1974, 88 Stat. 1862) and 1976 (Pub. Law 94-482, Title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234), set out certain exceptions to this proclamation, the exceptions are not pertinent here. This case involves "admissions to . . . institutions of professional education," (§ 901(a)(1)), and therefore is squarely within the scope of the statute.

of individuals as simply components of a . . . class." *City of Los Angeles, Dept. of Water v. Manhart*, _____ U.S. _____, 46 U.S.L.W. 4349 (1978). The fact that statutes and constitutional provisions dealing with discrimination typically are worded with a focus on "persons" or "individuals" is therefore not fortuitous. Their precise purpose is protection of the right of individuals to be treated as individuals. (See, e.g., § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)).

Thus, it is not surprising that the wording of § 901(a) bears a striking resemblance to that used in constitutional and statutory provisions which undeniably confer personal rights to be free from discrimination upon individuals. The Fourteenth Amendment, for example, states: "No state shall deny to *any person* . . . the equal protection of the laws." (Emphasis supplied).

The fundamental protections of many of the Civil Rights Acts are similarly worded. For example, 42 U.S.C. § 1981, recently construed to confer enforceable personal rights to be free from private employment and educational discrimination based on race² reads: "*All persons* . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ." (Emphasis supplied). See also 42 U.S.C. § 1982.

The direct ancestor of the language and structure of Title IX was Title VI of the Civil Rights Act of 1964, as those who devised Title IX stressed. (117 Cong. Rec.

²*Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Runyon v. McCrary*, 427 U.S. 160 (1976).

13555 (1971) (remarks of Sen. Bayh); 118 Cong. Rec. 5807 (remarks of Sen. Bayh); 117 Cong. Rec. 39252 (remarks of Rep. Mink). Section 601 of Title VI provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

While a majority of this Court declined, in *Bakke, supra*, to determine whether or not a private action to enforce § 601 of Title VI is available, five members of the Court laid great stress upon the fact that the language of Title VI created "personal rights." 46 U.S.L.W., at 4901 (Opinion of Powell, J.); *id.*, at 4936 nn.26 & 28 (Opinion of Stevens, J.).

It is true, of course, that § 901 of Title IX, like § 601 of Title VI, limits the programs covered to those "receiving Federal financial assistance." That limitation, however, is simply descriptive of the institutions against which the right may be asserted.³

The limitation to educational programs "receiving Federal financial assistance" was of relatively little practical significance by the time Title IX was passed. For, before 1972, and in the Education Amendments of 1972

³The reason for limiting Title IX to educational programs receiving federal financial assistance is nowhere stated in the legislative history of the statute. One may, however, infer the reason: to avoid any conceivably meritorious constitutional attack upon the legislation. For, in venturing into regulation of the internal affairs of public and private educational institutions, Congress was plainly tread-

of which Title IX was a part, Congress provided for broad programs of federal financial assistance to institutions of the kinds covered by Title IX.⁴ The result was that Title IX could be expected to cover, once passed, almost every elementary and secondary school and virtually all colleges

ing into areas traditionally reserved to the states. Constitutional attacks based on the limits of federal power could fairly have been anticipated.

It is probable, of course, that federal prohibition of gender-based discrimination in public institutions would be valid if enacted pursuant to § 5 of the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). A similar prohibition upon private educational institutions might well also be constitutional, as an exercise of federal power to regulate interstate commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). But, if either of these propositions was considered at all dubious (and both were plainly in question at the time Title VI, the structural model for Title IX, was enacted),

"There is of course no question that the Federal Government . . . may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 143 (1947)." *King v. Smith*, 392 U.S. 309, 333 (1968).

Cf. Steward Machine Co. v. Davis, 301 U.S. 548, 597-598 (1937); *Helvering v. Davis*, 301 U.S. 619, 645 (1937); *Rosado v. Wyman*, 397 U.S. 397, 420-423 (1970).

⁴See, e.g., Title I of the Education Act of 1964, 20 U.S.C. 241a et seq. (financial assistance to local school districts for the education of children of low-income families); Title IV of the Education Amendments of 1972, 20 U.S.C. § 241aa et seq. (financial assistance to local educational agencies for education of Indian children); Titles II, III & IV of the Education Act of 1965, 20 U.S.C. §§ 331 et seq., 821 et seq., 841 et seq. (financial assistance for *inter alia*, instructional materials, libraries, construction and demonstration projects in elementary and secondary school); National Defense Education Act of 1958 as amended, 20 U.S.C. § 401 et seq. (financial assistance to institutions of higher education, and to public ele-

and universities in the country.⁵ Thus, the limitation to programs "receiving federal financial assistance" does not detract from the conclusion that the language of § 901 created broad personal rights.

2. *Guarantee of Personal Rights as the Principal Purpose of Title IX.* The legislative history of Title IX vividly confirms the impression given by the language of § 901(a)—that Congress intended to create, in Title IX, a new and broad right, the right to be free from gender-based discrimination by educational institutions. For that history focuses almost entirely upon the scope of the sex-discrimination problem in education and the necessity to provide new substantive guarantees to deal with that problem, with little mention made of the con-

mentary and secondary schools, for various purposes relating to strengthening academic development of students); Bilingual Education Act of 1968, 20 U.S.C. § 880b et seq. (financial assistance to local educational agencies and institutions of higher education for educational needs of children of limited English-speaking ability); Titles V & VII of the Education Amendments of 1972, 20 U.S.C. §§ 887d & 900 et seq. (financial assistance to public and private educational institutions for consumer education and ethnic heritage studies); Higher Education Act of 1965, *as amended, inter alia*, by the Education Amendments of 1972, 20 U.S.C. § 1001 et seq. (grants to institutions of higher education for continuing education, library services, developing institutions and community colleges, student financial assistance and loans, teacher education, equipment and remodeling, construction, and cooperative education); International Education Act of 1966, 20 U.S.C. § 1171 (grants to institutions of higher education for graduate centers in international studies); Emergency School Aid Act of 1972, 20 U.S.C. § 1601 et seq. (grants to local educational agencies for programs concerning racial integration and minority education); and, Vocational Education Act of 1963 and Vocational Education Amendments of 1968, former 20 U.S.C. §§ 1241 et seq. and 1301 et seq. (grants for vocational education).

⁵United States Commission on Civil Rights, *A Guide to Federal Laws and Regulations Prohibiting Sex Discrimination*, (Clearinghouse Publication No. 46, July, 1976 (revised)), at 76.

nection between the guarantee extended and the process of distributing federal funds.

In assessing the legislative history, it is helpful to recall at the outset the setting in which Title IX was devised.

First, the spate of recent gender-based discrimination decisions under the Fourteenth Amendment (see, e.g., *Craig v. Boren*, 429 U.S. 190 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973)) did not exist. There was, at the time, only the bare glimmer of an indication from this Court that gender discrimination by public educational institutions could be subjected to any meaningful constitutional review. *Reed v. Reed*, 404 U.S. 71 (1971).⁶ The Equal Rights Amendment was pending in Congress during the same period as the Education Amendments of 1972,⁷ so that the inadequacy of existing constitutional protections against gender-based discrimination was the subject of contemporary Congressional attention.

Moreover, Congress was about to provide, in the other titles of the Bill of which Title IX was a part, for massive federal assistance to institutions of higher education, and

⁶As Senator Bayh noted in first introducing the amendment which became Title IX:

"While racial discrimination has been explicitly prohibited for nearly 20 years, only a few months ago the Supreme Court summarily affirmed a lower court decision upholding the constitutionality of a State's maintenance of a branch of its public university system on a sexually segregated basis." 117 Cong. Rec. 30155 (1971).

⁷The final vote in the House on the Equal Rights Amendment was 354 to 24, on October 12, 1971. 117 Cong. Rec. 35815 (1971). The final vote in the Senate was 84 to 8, on March 22, 1972. 117 Cong. Rec. 9598.

to students in those institutions, on a scale unheard of previously. Yet, there was no general federal protection against gender-based discrimination by these private institutions, many of which dominate entry into careers and professions.

Second, there was massive evidence before Congress,⁸ demonstrating that gender-based discrimination was both pervasive and destructive:

" . . . one of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women [which] . . . reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales. Indeed, the recent 'Report on Higher Education' funded by the Ford Foundation concluded, 'Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community.'" 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh).

In particular, it was reported to Congress that "the percentage of the female population enrolled in college [is] markedly lower than the percentage of the male

⁸Much of this evidence was derived from extensive hearings held in the summer of 1970 by the House Special Committee on Education. These hearings produced "over 1,200 pages of testimony documenting the massive, persistent patterns of discrimination against women in the academic world . . . [;] a situation which approaches national scandal . . ." 118 Cong. Rec. § 5804 (remarks of Sen. Bayh).

population." 118 Cong. Rec. 5805 (remarks of Sen. Bayh).⁹ And, even if admitted to college, women were less likely to receive adequate financial aid (118 Cong. Rec. 5805 (remarks of Sen. Bayh)), and were denied admission, although qualified, to prestigious honorary societies. 118 Cong. Rec. 5811 (paper of Dr. Bernice Sandler, n.9, *supra*). Moreover, the situation with regard to graduate and professional schools was even more dismal: In many areas of graduate and professional studies, including such prestigious fields as law and medicine, women in 1972 constituted a small percentage of the total enrollment. 118 Cong. Rec. 5805, 5806 (remarks of Sen. Bayh); see also, *id.*, at 5809.¹⁰

Even those women who did attain and complete graduate training remained victims of discrimination by

⁹It was recognized that "some of these differences [in enrollment] result from sex-role expectations in our society. However, there are indications that discrimination does exist at many schools." 118 Cong. Rec. 5805 (1972) (remarks of Sen. Bayh). Evidence of discriminatory practices included one study showing that identical applications would be rejected if the applicant were identified as female and accepted if the applicant were identified as male. 118 Cong. Rec. 5811 (paper of Dr. Bernice Sandler presented to Association of American Colleges). Indeed, certain colleges explicitly admitted only "especially well-qualified" women, while insisting upon no exceptional ability for men. 117 Cong. Rec. 39258 (1971) (remarks of Rep. Abzug); H. Rep. No. 92-554, 92nd Cong., 1st Sess. (1972), at 51.

¹⁰Particularly troublesome was the fact that far from improving, this situation seemed to be worsening. Thus,

"Dr. Francis S. Norris testified during the same hearings that although the number of women applying for admission to U.S. medical schools increased by more than 300 percent between 1929-30 and 1965-66—while male applications increased by only 29 percent—the percentage of women applicants who were accepted actually declined during the same time period." 118 Cong. Rec. 5806 (remarks of Rep. Bayh).

universities: the number of tenured female professors at universities was miniscule, even when those same universities produced much higher percentages of female Ph.D.'s. 118 Cong. Rec. 5805 (remarks of Sen. Bayh); see also, *id.*, at 5810. And, "the rule is that once hired women do not receive equal pay for equal work." *Id.*

This same phenomena was noted in public schools:

"[M]ore than two-thirds of the teachers in elementary and secondary schools are women, but they constitute only 22 percent of the elementary school principals and only 4 percent of the high school principals . . . [and] only two women can be found among 13,000 school superintendents." 118 Cong. Rec. 5805 (remarks of Sen. Bayh).

Further, elementary and secondary schools were noted to practice gender-based discrimination as to students as well: many vocational training schools and classes were sex segregated (118 Cong. Rec. 5806 (remarks of Sen. Bayh)), with the result that "[more] lucrative fields . . . [are] 'reserved' for males [even though] it is only tradition which keeps women out of those fields." *Id.*

In response to the "vicious and reinforcing pattern of discrimination" (118 Cong. Rec. 5804 (remarks of Sen. Bayh)), and to the lack of "effective protection for [women] as they seek admission and employment in educational facilities," (117 Cong. Rec. 30155 (remarks of Sen. Bayh)), Congress determined in Title IX to "guarantee that women enjoy the educational opportunity

every American deserves." *Id.* The bill was therefore designed as:

"a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (remarks of Sen. Bayh).

Frequent emphasis was given in the legislative debates to the need to give individuals the same protection from gender-based discrimination in education accorded, under the Constitution and the civil rights statutes, to victims of race discrimination:

"[What] this title does is to ask that a woman be considered as a human being, that her qualifications be considered in the same fashion as those of a male. If she qualifies, she should not be discriminated against on the basis of sex, just as we do not now discriminate on the basis of race." 117 Cong. Rec. 39259 (remarks of Rep. Green). See also, e.g., 117 Cong. Rec. 39256 (remarks of Rep. Waggoner); 117 Cong. Rec. 30155 (remarks of Sen. Bayh); 118 Cong. Rec. 5807 (remarks of Sen. Bayh).

To accord that protection, it was plainly necessary to create a *new* personal right theretofore non-existent, which is precisely what Congress did in § 901(a).¹¹

¹¹In this respect, Title IX differs from Title VI as construed by the majority of the Court in *Bakke*. See *Bakke, supra* (Opinion of Powell, J.); *id.* (Opinion of Brennan, White, Marshall, and Blackmun, JJs.). That is, Title IX, unlike Title VI, did not simply incorporate the constitutional standard for determining the legality of discrimination but created a new, more stringent standard for educational institutions. As interpreted by HEW, that standard is basically the same one established with respect to sex discrimination

For that reason, it is not at all surprising that Senator Bayh described as "the heart of [the Title] . . . the provision [§ 901(a)] banning sex discrimination in educational programs receiving federal funds." 118 Cong. Rec. 5803 (remarks of Sen. Bayh). Nor is it surprising that the various amendments circumscribing the protection accorded were added to § 901(a) of the bill, rather than to the later sections dealing with the enforcement authority of HEW. For, § 901(a) is the section describing the nature and limits of the personal right created, so that limitations placed elsewhere in the bill would be ineffective to assure that the prohibition upon discrimination extended only as far as intended.¹²

Congress' primary purpose, then, in devising Title IX was to provide:

"the essential *guarantees* of equal opportunity in education for men and women . . . [,] to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5804 (remarks of Sen. Bayh) (emphasis supplied).

under Title VII of the Civil Rights Act of 1964. Compare, e.g., 45 C.F.R. §§ 86.21 (b)(2), (c)(2) with *Dothard v. Rawlinson*, 433 U.S. 321 (1977) and *Manhart*, *supra*; see also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹²See discussion in Part II, *infra*, at pp. 33 - 39 of the amendment to Title VI of the Civil Rights Act of 1964 concerning contracts of guarantee.

The legislative history thus illustrates that Congress intended precisely what the language chosen for § 901(a) suggests—to create a new federal right, personal to each individual affected.

3. *Judicial Enforcement of Personal Rights.* From the conclusion that Congress consciously and explicitly created a federal right personal to individuals, the further conclusion that such right is enforceable in federal court ordinarily follows.¹³ For, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Consequently, "the . . . availability of federal equitable relief against threatened invasions of constitutional interests" has long been "presumed" (*Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring)), so that, by 1946,

"it [was] established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from

¹³Of course, there must also be jurisdiction to entertain the suit. It would appear, however, that if a cause of action is available under Title IX, there would always be jurisdiction under 28 U.S.C. § 1343(4), for the suit would be one "under [an] Act of Congress providing for the protection of civil rights" *Allen v. State Board of Elections*, 393 U.S. 544, 554 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.1 (1968). If this supposition proved incorrect, there would be jurisdiction in cases involving relief worth more than \$10,000 under 28 U.S.C. § 1331; suits involving less than that amount might be relegated to state court, but the right enforced would still be a federal right. Cf. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969).

doing what the Fourteenth Amendment forbids the state to do." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

Similarly, personal federal statutory rights are presumptively enforceable in federal courts. Thus, this Court:

"held in *Jones v. Alfred H. Mayer Co.*, that although [42 U.S.C.] § 1982 is couched in declaratory terms and provides no explicit method of enforcement, a federal court has power to fashion an effective equitable remedy. 392 U.S. [409], 414, n.13." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969). (1969). See also cases cited at p. 11, n.2, *supra*.

The *Jones v. Alfred H. Mayer Co.* holding was an example of the principle that where,

"[a]n Act as a whole indicates an intention to establish a statutory right . . . the litigant may enforce [that right] . . . by such legal or equitable actions or procedures as would normally be available to him." *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940).¹⁴

¹⁴The issue of whether damages, as opposed to equitable relief, may be awarded without explicit authorization has been regarded as presenting different and more difficult, although not insuperable, problems. *Bivens*, *supra*, 403 U.S., at 395-396; *id.*, at 400-406 (Harlan, Jr., concurring); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 415 n.14 (1968); compare *Deckert*, *supra*, with *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); cf. *Piper v. Chris Craft Industries, Inc.*, 430 U.S. 1, n.33 (1977).

Justice Harlan in *Bivens* analyzed the distinction between granting equitable relief and providing a cause of action for legal damages as one which "relates, not to whether the federal courts have the power to afford one type of remedy as opposed to the other, but to the criteria which should govern the exercise of our power." 403 U.S., at 406. He suggested that the appropriate criteria for whether to permit legal damages where a personal federal right is at stake is "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id.*, at 407.

In sum, since Title IX expressly creates personal federal rights, since the primary purpose and intent of the statute was to create such rights, and since judicial relief is ordinarily available to enforce a clear personal federal right, such relief would be available if § 901 were the only section of Title IX. The question, then, is whether the fact that Congress went further than a simple declaration of rights and included provisions for administrative action in furtherance of those rights requires a different result than if it had failed so to provide.

II

The Availability of an Administrative Fund Termination Mechanism under § 902 of Title IX does not Detract From the Personal Rights Created by § 901, or Negate the Availability of Judicial Enforcement of those Rights.

The Court of Appeals, while conceding on rehearing that the result might well be otherwise had Congress provided *no* administrative enforcement mechanism (559 F.2d

While Ms. Cannon is seeking damages as well as equitable relief, there is no need to determine at this juncture the availability of a legal damages remedy under Title IX. If Ms. Cannon's cause of action is proven and the equitable relief sought is granted, petitioner may no longer "have suffered any uncompensated injury." *Jones*, *supra*, at 414, n.14. Under these circumstances, it would be inappropriate to decide the damages question. *Id.* Further, many forms of monetary relief are available as an exercise of the equitable jurisdiction of the federal courts. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-22 (1975) *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-93 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-403 (1946). Since, in many Title IX cases, the monetary relief sought, if any, may be restitutionary and therefore equitable in nature, the availability of monetary, as opposed to declaratory and injunctive, relief under Title IX is best left until a case arises in which the availability of a precise sort of monetary relief is at issue.

1063, 1082), viewed the enforcement provisions of § 902 of Title IX—specifically, the fund termination authority—as precluding any private remedy for breach of the guarantee contained in § 901. The Court of Appeals' decision in effect limits the personal right created by the broad language of § 901 to the right to the enforcement procedures established in § 902.

This proposition must be rejected. Comparison of the rights created in § 901 with the enforcement mechanism created by § 902 demonstrates that the enforcement authority conferred upon federal agencies and departments is complementary to, but not coextensive with, the right created by Title IX, and was not designed as a means of assuring *individuals* their rights under § 901. The legislative history of Title IX, and of Title VI of the Civil Rights Act upon which it was structurally modeled, confirms that Congress did not intend the enforcement authority as a limitation upon the right created, or upon the ordinary power of federal courts to enforce personal federal rights.

1. *Comparison of §§ 901 and 902.* Section 902 provides, first, that federal departments and agencies are “authorized and directed” to implement Title IX by issuing “rules, regulations, or orders of general applicability.”¹⁵

¹⁵The fact that departments and agencies are directed to implement the general non-discrimination standard with particular regulations adapted to specific programs is not itself of any moment in

Second, departments and agencies “may” effect compliance with the requirements established “by termination or refusal to grant or to continue assistance” or “by any other means authorized by law.”¹⁶ Third, departments and agencies may not act to cut-off funds unless opportunity for voluntary compliance is provided. If no such compliance is forthcoming, a full hearing must be held prior to termination of funds. Finally, an intention to terminate funds must be reported to the appropriate committees of Congress before the termination may be effective.

The fund termination authority is incapable of protecting the broad rights created by § 901 for a very fundamental reason: It operates only prospectively, while § 901 applies in the present to any institution “receiving” federal financial assistance.

The prospect of fund termination in the future may, of course, serve as a deterrent to those programs which expect to rely on federal funds in the future. But, no such deterrent exists under § 902 with regard to the

determining the degree to which enforcement of the statute's guarantees has been exclusively committed to administrative process. See, e.g., *J. I. Case Co. v. Borak*, *supra*; *Piper v. Chris-Craft Industries*, *supra*; *Lewis v. Martin*, 397 U.S. 552 (1970).

¹⁶The Department of Health, Education and Welfare has construed the “other means authorized by law” to include “a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States . . . or any assurance or other contractual undertaking and . . . any applicable proceedings under State or local law.” 45 C.F.R. § 80.8(a) (emphasis supplied), as incorporated in 45 C.F.R. § 86.71. Thus, HEW has interpreted “other means authorized by law” to authorize lawsuits by the Attorney General enforcing public, but not private, rights.

funding of discrete, time-limited programs. Yet, the guarantees of § 901 apply whether or not the program involved expects to continue as a federally assisted program.

Moreover, even with regard to institutions such as the medical school respondents in this case which, presumably, expect to continue to rely upon federal funds, the ultimate cut-off sanction could not be expected to assure for individuals protection of the personal rights established in § 901. For example, Ms. Cannon, if she is allowed to proceed with her lawsuit and establishes on the merits that she was indeed denied admission because of gender-based discrimination, would be entitled, under ordinary equitable principles, to a court order requiring her admission to the medical schools for the normal course of study. See *Bakke, supra*, 46 U.S.L.W., at 4896. If she were required instead to rely upon the administrative mechanism exclusively, she might well never achieve the medical school education she was denied in violation of § 901. For, if HEW agreed that her rights had been violated and attempts to effect *voluntary* compliance failed, termination proceedings could be instituted. But, while termination of funds will assure against violation of § 901 in the future,¹⁷ such termination will not remedy past violations

¹⁷For this reason, a suit for enforcement of rights under § 901 is not the functional equivalent of a private suit to compel termination of funds under § 902. That is, once a violation of the rights accorded by § 901 is proven, a court applying equitable principles could order an institution to remedy that violation by taking action in the future even if, at the time that action is taken, the program is no longer receiving federal funds. Cf. *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Hills v. Gau-*

of § 901, or provide for Ms. Cannon and others already denied their rights under § 901 the protection accorded by that section. That is, if § 902 were the exclusive means of enforcing § 901, Ms. Cannon might never be admitted to medical school even if the reason for denial of admission were proven to be gender-based.

The rights created under § 901 are not coextensive with the enforcement mechanism established under § 902 for another reason: Section 901 applies to any educational program or activity receiving federal funds, while § 902 vests enforcement authority only in federal "agencies or departments." While it is true that, for the most part, federal financial assistance to education is dispensed through federal departments and agencies, it is not uniformly so. The Houses of Congress, the Executive Office of the President, and various governmental corporations directly funded by Congress may dispense such assistance as well.

For example, the Legal Services Corporation, created in 42 U.S.C. § 2996 et seq., may not be an "agency" or "department" within the meaning of § 902. See 42 U.S.C. § 2996d(e)(1). Yet, it may, either directly or by grant or contract, undertake educational activities, 42 U.S.C. § 2996e(a)(3)(B). While § 901 would apply to programs such as those funded by the Legal Services Corporation, § 902, seemingly, would not. Thus, if § 901 were not privately enforceable, there might be no enforcement at all for such programs.

treaux, 425 U.S. 284 (1976). Thus, a program could not escape the effect of a judicial remedial order under § 901 by voluntarily refusing further federal funds.

Section 902 is not only incapable, operating alone, of serving the rights protected by § 901, it serves a function which § 901 standing alone would not. The authority and responsibility of federal departments and agencies to take gender-based discrimination into account in making funding decisions would not inexorably follow from personal protection against discrimination by programs receiving federal funds. Indeed, questions about whether such authority existed with respect to racial discrimination prohibited by the Fourteenth Amendment was the original reason for expressly including that authority in the Civil Rights Act of 1964. 109 Cong. Rec. 11161 (1963) (Message of Pres. Kennedy).

These considerations indicate that §§ 901 and 902 serve entirely different functions. The first guarantees rights to individuals in the same way as do the equal protection clause of the Fourteenth Amendment and the declaratory civil rights statutes. The second lodges in federal departments and agencies the authority, and the responsibility, to refuse federal funds to programs which do not accord the rights guaranteed.

Obviously, Congress viewed the administrative enforcement mechanism as a useful means of helping to establish the rights created by Title IX as a reality on a national basis. But it is odd, indeed, to conclude, as in effect did the Court of Appeals, that by creating an entirely separate and differently focused means in aid of its ultimate goal, Congress negated the assurance of relief to indi-

viduals which would otherwise follow from a declaration of individual rights.¹⁸

2. *Congressional Intent on the Role of § 902.* The availability of individual judicial relief follows, without more, from the structure and language of Title IX as read in the light of the effect ordinarily to be given Congressional guarantees to individuals. There are, however, specific indications that Congress did not understand § 902 to constitute the sole means of enforcing § 901.

A. First, and perhaps most important, there is another section of the Act of which Title IX was a part which is expressly predicated upon the understanding that the language and structure used in Title IX permit judicial

¹⁸This is not to say, of course, that Congress may not guarantee personal federal rights and then expressly require that such rights may be vindicated in court only in certain ways and only after certain procedural prerequisites are fulfilled. For example, in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq. Congress guaranteed the right to be free of discrimination in places of public accommodation but required notice to the appropriate local agency, entrusted with local enforcement of an antidiscrimination guarantee, before a private suit could be instituted (42 U.S.C. § 2000a-3(c)); limited such a suit to an action for preventive relief only (42 U.S.C. § 2000a-3(a)); and, expressly made this limited suit, and enforcement by the Attorney General, the exclusive remedies for violations of the rights protected. 42 U.S.C. § 2000a-6(b).

Similarly, in Title VII of the same Act, 42 U.S.C. § 2000e et seq., Congress guaranteed the right to be free of employment discrimination, but required a person whose rights had been violated to file a complaint with the Equal Employment Opportunity Commission, and to wait for this agency to act before instituting a civil suit. 42 U.S.C. § 2000e-5(f)(1). Where such procedural prerequisites are lacking, however, the implication is not that no judicial enforcement is permitted but, rather, that the ordinary rules governing civil actions apply in such an enforcement proceeding. *Johnson v. Railway Express Agency, supra*, 421 U.S., at 460-461.

enforcement by affected individuals. Section 11 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, provides attorneys' fees to successful plaintiffs in suits involving education and brought under, *inter alia*, Title VI of the Civil Rights Act of 1964, the structural model for Title IX.¹⁹ The predicate for providing attorneys' fees to successful individual plaintiffs is, of course, the understanding that a private enforcement action is available. By 1972, Title VI had already been held by several courts to permit such enforcement.²⁰ and Congress, far

¹⁹The Emergency School Aid Act, in its final form, passed both houses of Congress, as did Title IX, as part of the Education Amendments of 1972, and appeared as Title VII of the Amendments. See S.Rep. No. 92-604, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Ad. News, at 2595.

Section 11 provides:

"Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Emphasis supplied.)

²⁰Cases decided before 1972 indicating the existence of a private right of action under Title VI include: *Alvarado v. El Paso Indep. School District*, 445 F.2d 1011 (5th Cir. 1971); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir. 1967), cert. denied, 388 U.S. 911 (1967); *Rolfe v. County Board of Education*, 282 F.Supp. 192, 194 (E.D. Tenn. 1966); *Southern Christian Leadership Conference, Inc. v. Connolly*, 331 F.Supp. 940 (E.D. Mich. 1971); *Gautreaux v. Chicago Housing Authority*, 265 F.Supp. 582 (N.D. Ill., 1967).

In *Bossier Parish*, the earliest circuit court case and therefore the best known, Judge Wisdom, joined by Judge Brown and Chief Justice (then Judge) Burger stated:

"The Negro school children, as beneficiaries of [Title VI], have standing to assert their Section 601 rights." *Id.*, at 852.

from disagreeing with that assessment, determined to encourage the filing of such lawsuits by assuring successful plaintiffs payment of attorneys' fees. In particular, there was discussion in Congress of the need for private as well as public enforcement of the civil rights statutes because of "the enormous gaping law enforcement crisis in the field of civil rights." 117 Cong. Rec. 11339 (1971) (remarks of Sen. Mondale).²¹

It is true that, in 1972, Congress did not provide attorneys' fees for plaintiffs in Title IX cases. This step was taken, as to Title IX, after a period of experience under the new Act parallel to that which had occurred under Title VI by 1972.²² This delay does not,

²¹See also 117 Cong. Rec. 11339-11340 (remarks of Sen. Mondale); *id.*, at 11345; 117 Cong. Rec. 10951-10952 (remarks of Sen. Dominick).

²²The later Attorneys' Fees Act of 1976, 42 U.S.C. § 1988 as amended, not only extended attorneys' fees provisions to Title IX but also to all Title VI cases. Statements made during the debate of that bill stressed the importance of private enforcement of Titles VI and IX. See, e.g., 122 Cong. Rec. S16252 (daily ed., Sept. 21, 1976) (remarks of Sen. Kennedy); 122 Cong. Rec. S16262 (remarks of Sen. Allen); 122 Cong. Rec. S16431 (remarks of Sen. Hathaway); 122 Cong. Rec. S17051 (remarks of Sen. Tunney); 122 Cong. Rec. S17052 (remarks of Sen. Abourezk); 122 Cong. Rec. H12165 (daily ed., Oct. 1, 1976) (remarks of Rep. Sieberling); 122 Cong. Rec. H12159 (remarks of Rep. Criban); 122 Cong. Rec. H12164 (remarks of Rep. Holtzman).

It is true that other members of Congress noted, quite correctly, that the 1976 bill "does not authorize . . . any private right of action which does not now exist." 122 Cong. Rec. H12161 (daily ed., Oct. 1, 1976) (remarks of Rep. Railsback). The salient point, however, is that the members of Congress in 1976 shared the view of Congress in 1972—that the language and structure of Title IX *did* create a personal right which could be enforced in court.

however, detract from the significance of § 11. For, that section embodied in positive law the plain understanding that the two part approach of Title IX—creation of personal rights in one section, and provision of an administrative mechanism focused upon the funding process in another—does not destroy the usual availability of private enforcement of personal federal rights.

B. Second, Congress apparently perceived no fundamental inconsistency between private enforcement suits and the means of administrative policing of Title IX provided in § 902. For, Congress failed to foreclose the judiciary from enforcing § 901 rights in lawsuits brought at the behest of individuals and derived from Title IX although not brought directly under it. For example, HEW requires that every application for Federal financial assistance for any education program or activity “shall contain an assurance . . . that [the] program or activity . . . will [not violate § 901].” 45 C.F.R. § 86.4(a). A recent decision of this Court suggests that private individuals could sue for enforcement of such assurances if state law so permits, *Miree v. DeKalb County*, 433 U.S. 255 (1977); cf. *Lau v. Nichols*, 414 U.S. 563, 571 n.2 (1974) (Stewart, J., concurring). Similarly, if the institution sued were run by a state or local governmental body, a lawsuit for denial of the Federal statutory rights guaranteed by Title IX could almost certainly be premised upon 42 U.S.C. § 1983.²³ See

²³A case presently pending before this Court, *Chapman v. Houston Welfare Rights Organization*, 555 F.2d 1219 (5th Cir. 1977), cert. granted, 46 U.S.L.W. 3526 (1978) (No. 77-719) involves the question whether 42 U.S.C. § 1983 includes, as that Section’s literal language would suggest, cases based upon denial of federal statutory rights.

De la Cruz v. Tormey, ____ F.2d ____ (9th Cir. Sept. 13, 1978), Slip Op., at 20-23. The fact that Congress failed to eliminate either of these possibilities suggests that no exclusion of the ordinary judicial means of enforcing personal rights was intended.

C. Third, the legislative history of Title VI supports our view of the diverse roles of §§ 901 and 902. As noted previously (Part I (2), *supra*), the debate in Congress on Title IX focused almost entirely upon the character of the guarantee provided. There was little direct discussion of the administrative enforcement procedure; rather, it was stressed that the provisions of Title IX on that matter were “parallel to those found in Title VI of the 1964 Civil Rights Act.” 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh). Thus, while the considerations supporting the availability of private judicial enforcement are especially compelling as regards Title IX,²⁴ the legislative history of Title VI is also of some aid in construing the purport of Title IX. That history is inconclusive on the precise question of whether private enforcement was contem-

²⁴As noted, Title IX’s *principal* focus was the creation of new personal rights while, in Title VI, the constitutional protections were considered adequate, at least as regards public institutions, and the major purpose of the legislation was to involve the federal government in assuring protection of previously existing rights. (*Bakke, supra*, 46 U.S.L.W., at 4900 (Opinion of Powell, J.); *id.*, at 4912-4915 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.)) Further, by 1972, the language and structure of Title VI had been judicially construed to permit private enforcement (see n. 20, *supra*), and this understanding was incorporated in another Title of the Act of which Title IX was part. See pp. 29-32 *supra*.

plated.²⁵ There are, however, several strong indications in legislative history of § 601 of Title VI that § 601 was intended and understood as an independent declaration of rights, not limited by the provisions of § 602.

The message of President Kennedy which outlined the proposals that became the Civil Rights Act of 1964 clearly envisioned the administrative fund termination mechanism as supplementary to, rather than a replacement of, private enforcement of personal rights:

"Simple justice requires that public funds to which all taxpayers of all races contribute not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination . . . It should not be *necessary* to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution *also*. . . ." 109 Cong. Rec. 11161 (1963) (emphasis supplied).

This same view was reflected during the debate upon Title VI:

"If Federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies fall into two categories: First, action to end discrimination; or second, action to end the payment of funds. Obviously, action to end discrimination is preferable . . . But if the discrimination persists . . . , how else can

²⁵See legislative history discussed in *Bakke*, 46 U.S.L.W., at 4900, n. 18 (Opinion of Powell, J.); *id.*, at 4926 & n.4 (Opinion of White, J.); *id.*, at 4936 n.28 (Opinion of Stevens, J.). Read in context, the statements cited by Justices Powell and White to the effect that no private enforcement suits were available seem plainly to pertain to suits to terminate funds, rather than to suits to enforce § 601 through equitable relief. See n. 17, *supra* & n. 20, *infra*.

the principle of nondiscrimination be vindicated except by the nonpayment of funds?" 110 Cong. Rec. 9605 (1964) (remarks of Sen. Ribicoff).

Moreover, it seems that the language and structure of Title VI were carefully chosen to make clear that the Title embodied both a declaration of personal rights and an administrative mechanism, rather than simply the latter. For, the first version of what became Title VI, H.R. 7152, 88th Cong., 2d Sess. (1964), had no declaration of rights parallel to § 601. Rather, it simply provided that Federal financial assistance need not "be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against" The House Judiciary Committee rejected this language, substituting the two-part approach used in Title VI. See H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. & Ad. News 2391.

The significance of this change was understood by the members of Congress, as a controversy which developed during the enactment of Title VI demonstrates. In the House of Representatives, opponents of Title VI had complained about the fact that its language appeared to encompass federal assistance in the form of contracts of loan or guarantee. H.R. Rep., *supra*, 1964 U.S. Code Cong. & Ad. News, at 2454. The result it was claimed, given the degree to which private mortgages were guaranteed by the federal government, would be to convert Title VI into a fair housing bill. See, e.g., 110 Cong. Rec. 2500-2501 (1964) (remarks of Rep. Ryan, Celler, Jones and

Randall). In response to this fear, § 602 was amended to make clear that no administrative action would be taken on the basis of contracts of loan or guarantee. *Id.*

In the Senate, however, it was objected that amending § 602 was insufficient. Unless § 601 were also amended to the same effect, it was said, "Section 601 could be construed to be an open housing ordinance." 110 Cong. Rec. 13435 (1964) (remarks of Sen. Long); see also, *id.*, at 13436 (remarks of Sen. Long).²⁶ The premise of this suggestion was that:

"[S]ection 601 is not limited by section 602 . . . [Although] both sections are in one title . . . they do not conform . . . Not only do I say so; the Senator from Minnesota [Mr. Humphrey] says so. The bill so provides . . . [T]his provision purports to give statutory authority for an order . . . to haul any householder who has a Government-secured loan into Court." 110 Cong. Rec. 13436 (remarks of Sen. Gore).

While it was argued, in response to this proposal, that "[t]he trouble with the sponsors of the . . . amendment is that they are not reading Title VI as a whole" (110 Cong. Rec. 13435 (remarks of Sen. Humphrey)), there was nonetheless, adamant resistance on the part of the sponsors of Title VI, and of the Justice Department, to

²⁶The care with which the two-part approach of Title VI and the language thereof were chosen was also stressed by Senator Dirksen: "This language was hammered out slowly and rather carefully in the course of many conferences. I earnestly hope that the amendment . . . will be voted down. 110 Cong. Rec. 13438.

amending § 601 to parallel § 602 in this regard. The reason was:

"[I]f we were to write any exception into [§ 601], we shall be acting to allow discrimination in some of our programs . . . We have spent much time and have been very meticulous in drafting Title VI" 110 Cong. Rec. 13442-13443 (remarks of Sen. Pastore).

This view was also succinctly expressed by Senator Keating:

"All that is necessary is to read section 601. . . . We cannot say that it shall be national policy under the Constitution to discriminate. Section 602 is *entirely different* . . . [T]he Federal agency is limited in what it can do under Section 602." *Id.*, at 13437 (emphasis supplied).

See also *id.*, at 13442 (remarks of Sen. Humphrey); *id.*, at 13469 (remarks of Sen. Long); *id.*, at 13448 (remarks of Sen. Dirksen).

The result was that, rather than amending § 601, Congress added an entirely different section, § 605, 42 U.S.C. § 2000d-4. This amendment was designed to assure that Title VI was not construed to add any theretofore non-existent power of the Executive Branch with regard to fair housing protection, while avoiding any sanctioning of discrimination in federally-assisted housing. 110 Cong. Rec. 13469-70.

The import of this sequence is that, first, the entire dispute was premised on the assertion that § 601 serves

a different function from § 602; second, that despite some statements appearing to dispute this construction, the Senate as a whole apparently concurred in it, for it agreed to an amendment with respect to the precise subject of dispute; and third, that by refusing to amend § 601 itself, Congress indicated an intention to preserve the distinction between the declaration of rights and the conferral of enforcement authority upon the Executive Branch. Since Title IX was modelled upon Title VI, the same distinction applies to Title IX.

• • • • •

In sum, the language and structure of Title IX, as well as the legislative history of that Title and of Title VI of the Civil Rights Act of 1964, make plain that § 902 was not intended as a limitation upon the personal rights created in § 901, or upon the ordinary availability of private judicial enforcement of personal federal rights. Rather, § 902 provided means of promoting the protections accorded by § 901 additional to those which would exist if § 901 stood alone.

III

The Court of Appeals Misconstrued and Misapplied this Court's Precedents on the Availability of Private Judicial Enforcement.

In reaching its conclusion that the fund termination mechanism in § 902 was the exclusive means of enforcing § 901, the court below entirely ignored the personal character of the rights created in § 901, and the lack of

congruence between those rights and the differently-focused procedures contained in § 902.²⁷ Instead, the Court of Appeals relied upon a series of recent cases concerning regulation of industry in which the statutory remedy was held to be exclusive. These cases—*National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers* ("Amtrak"), 414 U.S. 453 (1974); *Securities Investor Protection Corp. v. Barbour* ("SIPC"), 421 U.S. 412 (1975); and *Cort v. Ash*, 422 U.S. 66 (1975)—involved statutes which bear little resemblance to Title IX in their language, structure, or purpose. Moreover, properly understood, the analysis applied in the most fully explicated of these cases, *Cort, supra*, yields the same result we reach under the somewhat different approach employed above. Finally, the Court of Appeals entirely missed the significance of three other cases—*Allen v. Board of Elections*, 393 U.S. 544 (1969), *Calhoon v. Harvey*, 379 U.S. 134 (1964), and *Rosado v. Wyman*, 397 U.S. 1207 (1969)—which, taken together, squarely control the disposition of this case.

1. *Amtrak, SIPC, and Cort.* Title IX expressly guarantees rights to individuals. See Part I, *supra*. In contrast the statutory provisions which this Court interpreted in the three cases upon which the Court of Appeals principally relied involved the regulation of industry. In *Amtrak, supra*, the provision sued under provided that

²⁷Indeed, the court characterized the plaintiffs in Title IX enforcement cases as "private attorneys general" (559 F.2d, at 1027), implying, erroneously, that Ms. Cannon and others in her position are attempting to enforce public rather than personal interests.

except under specified circumstances, "no railroad may discontinue any intercity passenger train . . ." 45 U.S.C. § 564. In *Cort*, the statute declared that: "It is unlawful for any national bank or any corporation . . . to make a contribution or expenditure in connection with any election . . ." 18 U.S.C. § 610. And in *SIPC*, the section at issue stated that if a brokerage firm shows particular indices of financial responsibility, ". . . SIPC . . . may apply to any court . . . for a decree adjudicating that customers of such members are in need of the protection provided by [the Act] . . ." 15 U.S.C. § 78eee(d)(2)

As their language suggests, the statutes construed in *Amtrak*, *SIPC* and *Cort* were Congressional responses to macro-economic problems. The focus was on regulation of industry, on forces and groups rather than individuals.

The *Amtrak* Act, for example, was a response to the disastrous economic condition of the railroads. While Congress was concerned with railroad passengers, it recognized that "a rational reduction of present service will be required in order to save *any* passenger service." H.R. Rep. No. 91-1580 p. 3 (1970), reprinted in 1970 U.S. Code Cong. and Admin. News, at 4747, cited in *Amtrak*, 414 U.S., at 463 (emphasis in original). Thus, although the interests of the railroad-riding public in general were to be benefited by the massive federal involvement in the industry, no *individual* passenger's interests in having service on any particular route were guaranteed.

Similarly, the act creating SIPC ("SIPA") was a response to an economic crisis. The securities industry experienced a serious business contraction that led to the failure or instability of many brokerage firms. *SIPC*, 421 U.S., at 415. Congress created a non-profit, private membership corporation with powers to institute a new form of liquidation proceeding. While a primary purpose of Congress in enacting SIPA was the protection of investors, there was no guarantee that SIPC would intervene to save any *individual's* investment. In fact, the Court stressed that whether a firm was to be liquidated in accord with the special provisions of SIPA involved considerations of "public interest", and not solely the rights of individuals: "As with *Amtrak*, so with *SIPC*, Congress has created a corporate entity to solve a public problem." *Id.*, at 420.

Finally, in *Cort*, the statute involved was a penal statute designed principally to serve a public interest—assuring that "federal elections are free from the power of money." 442 U.S., at 82. The protection of corporate shareholders was at best a subsidiary purpose. 422 U.S., at 81.

Thus, in all three of these cases, there was Congressional concern with the interests of particular *groups*—the investing public in *Cort* and *SIPC*, and railroad-riding public in *Amtrak*—but the statutes were a response to an economic or political crisis; the substantive provisions as well as the means of implementing those provisions were based upon quite different considerations than protection of the rights of individuals.²⁸ For this reason, these cases did not

²⁸Most of the other cases in which this Court has discussed the problem of implication of a private right of action have similarly

involve situations in which general principles concerning judicial enforcement of personal rights raised a presumption in favor of private lawsuits. The Court of Appeals therefore erred in viewing these cases as dispositive of the present one.

2. *The Cort Analysis.* Not only are the results in *Amtrak*, *SIPC*, and *Cort* not determinative of the present controversy, but the mode of analysis employed in these cases, explicated at some length in one of the cases, *Cort*, supports if properly applied the availability of private enforcement of § 901 of Title IX. In *Cort*, the Court set out several factors relevant to determining the availability of private actions enforcing federal statutes:

"First, is the plaintiff 'one of the class for whose *especial* benefit the statute was created.' * * *—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme

concerned statutes which do not expressly guarantee rights to individuals. Many of the cases have involved interpretation of criminal provisions, included as part of complex economic regulatory statutes. (*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (Securities Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977) (Securities Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5); *Piper v. Chris Craft*, 430 U.S. 1 (1977) (15 U.S.C. § 78n (a)). *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (15 U.S.C. § 78n (a)); *Texas & P.C. Co. v. Rigsby*, 241 U.S. 33 (1915) (45 U.S.C. § 11). Others have involved interpretation of provisions specifying the powers and duties of governmental and quasi-governmental entities: *Wheeldin v. Wheeler*, 373 U.S. 647 (1963) (Subpoenas; Legislative Reorganization Act of 1947, House Rule XI(1)(q)(2)); *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959) (reasonable rates for motor carriers; 49 U.S.C. § 316 (b) & (d)).

to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in any area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S., at 78.

All four of these factors, properly understood, argue strongly in favor of private judicial enforcement of § 901.

The answer to the first question, whether "the plaintiff one of the class for whose *especial* benefit the statute was enacted," is not only plainly affirmative in this case, but is the strongest reason for the availability of a private judicial remedy. For in Title IX, as we have shown above, the essential purpose of the statute was to guarantee individual rights to equal educational opportunities. Thus, not only are alleged discriminatees as a *class* protected by Title IX, their *individual* protection is central to the statutory scheme.

The second factor considered in *Cort* was: "is there any indication of Congressional intent to create or deny a remedy for members of the class to which the plaintiffs belong?" Application of this factor poses little difficulty in this case. For, *Cort* explicitly recognized that "... in situations in which it is clear that federal law has granted a class of persons certain rights, it is *not necessary to show an intention to create a private cause of action* although an explicit purpose to deny such cause of action would be controlling." *Cort, supra*, 422 U.S., at 82 (emphasis supplied). There was no explicit intent to deny a private cause of action under Title IX.

The Court of Appeals, however, nonetheless stressed "the lack of any explicit or implicit intent to *create* a private judicial remedy . . ." (559 F.2d at 1087 (emphasis supplied)) and viewed the "express provision of a sophisticated scheme of administrative enforcement . . . as an indication of an *implicit* legislative intent to exclude any private judicial remedies . . ." *Id.* In essence, then the court below approached this case as one involving the usual methods of statutory construction. While, in this case, consideration of the legislative materials does indicate an intent to permit private enforcement (Part 11(2), *supra*), as Justice Harlan noted in *Bivens, supra*:

"The exercise of judicial power involved in the private cause of action cases simply cannot be justified in terms of statutory construction, see Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1120-1121 (1969); nor did the *Borak* Court purport to do so. See *Borak*, 377 U.S. at 432-434. The notion of 'implying' a remedy, therefore, . . . can only refer to a process whereby *the federal judiciary exercises a choice among traditionally available judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law.* See *ibid.*, and *Bell v. Hood, supra*, 327 U.S., at 684." 401 U.S., at 402 n.4 (emphasis supplied).

Thus, as *Cort* recognized, the issue in private cause of action cases is not, ordinarily, whether Congress *intended* such actions but, rather, whether it expressly negated the power of the judiciary to provide traditional remedies.

Moreover, it is obvious that legislative creation of an enforcement mechanism may not, without more, be con-

strued as an "implicit" intent to forbid private actions; indeed, *Cort* expressly so stated. 422 U.S., at 82 n.14. For, while Congress does occasionally pass a statute providing no enforcement mechanism at all (see, e.g., 42 U.S.C. §§ 1981 and 1982), such statutes are exceedingly rare; in most of the cases in which private remedies *have* been "implied," those were one or more remedies included in the statute, but such remedies were held not to be exclusive. See, e.g., *Borak, supra*; *Rigsby, supra*; *Allen v. Board of Elections*, 393 U.S. 544 (1969); *Rosado v. Wyman*, 397 U.S. 397 (1970). Thus, the approach of the Court of Appeals to the second *Cort* factor was premised upon a basic misunderstanding of the role of the courts in cases involving the availability of private remedies.

As to the third *Cort* factor,—whether the remedy sought is consistent with the underlying purpose of the statutory scheme—it is difficult to see how personal remedies would be inconsistent with that scheme, where the purpose of the statute is to guarantee individuals the right to equal opportunities. For example, in *Allen, supra*, the Court, noted that the Voting Rights Act there construed included a "guarantee . . . that no person shall be denied the right to vote for failure to comply with an unapproved new enactment" *Id.*, at 557. While the Attorney General has the power to enforce this guarantee,

"[t]he Attorney General has a limited staff and often might be unable to uncover quickly new regulations . . . The guarantee . . . might well prove an empty promise

unless the private citizen were allowed to seek judicial enforcement of the prohibition. *Id.*, at 557."²⁹

The Court of Appeals questions the appropriateness of implying a private remedy for violation of § 901 rights in light of the Congressional emphasis in § 902 of the role of voluntary compliance in the administrative procedures for fund termination. However, a private enforcement action not only furthers the Congressional purposes of securing personal rights, but does not interfere with the administrative fund termination mechanism.³⁰

²⁹The actual experience under Title IX demonstrates that, certainly to the present time, HEW has not been able effectively to implement the enforcement power it has under § 902. Until July, 1975, the implementing regulations for Title IX were not even promulgated. Thereafter, HEW refused, on the basis of insufficient resources, to handle Title IX complaints regarding elementary and secondary schools in seventeen southern and border states and, as of October 1, 1976, regarding institutes of higher education as well. Because of this sorry enforcement effort, some of the present *amici*, along with other groups and individuals, filed suit against HEW to compel the beginning of enforcement efforts. *Women's Equity Action League ("WEAL") v. Mathews*, Civ. Action No. 74-1720 (D.D.C.). The settlement recently reached in that lawsuit would, if effectively implemented, make HEW, for the first time, a significant force in the enforcement of Title IX. See *WEAL, supra*, (Order of December 29, 1977). However, the history of the related litigation concerning Title VI, *Adams v. Califano*, Civ. Action No. 70-3095 (D.D.C.) illustrates that a succession of court orders in that case has yet to result in effective enforcement of Title VI. Preliminary evidence indicates that HEW has been similarly unable to comply with the December 29, 1977 WEAL Order. Further that Order, of course, does not eliminate the inherent problems with § 902 as a means of enforcing individual rights. See Part II(1), *supra*.

³⁰The case might be otherwise as regards a private action seeking termination of funds. *Bakke, supra* 46 U.S.L.W., at 4936 n.25 (Opinion of Stevens, J.).

In fact, the emphasis on voluntary compliance is *served* by private lawsuits. For, that emphasis resulted from Congressional concern with the drastic nature of fund termination. Vindication of personal rights through private lawsuits may help to avoid for fund termination.

The fourth *Cort* criterion—whether the cause of action is “one traditionally relegated to state law, in an area basically the concern of the states”—is also met in this case, in a manner which not only permits but strongly supports private enforcement. Federally created personal rights are not a subject traditionally relegated to state law. *Bivens, supra*. In the case of Title IX, the basic federal concern is obvious: federal funds are financing the educational programs involved, and gender-based discrimination in educational institutions was perceived as a nationwide problem requiring a nationwide solution. See Part I(2), *supra*. To relegate individuals to widely-variant state laws to vindicate their personal rights to be free of sex discrimination in institutions receiving federal funds would be an odd way indeed to implement a federal guarantee to *all* persons in the United States.

Thus, applying the *Cort* analysis properly yields the result that the individual rights created in Title IX can be enforced by private lawsuits. The Court of Appeals erred in determining otherwise.

3. *The dispositive cases.* Our view of *Cort* is supported by three pre-*Cort* cases which the Court of Appeals either did not mention at all—*Calhoon v. Harvey*, 379 U.S. 134 (1964)—or mentioned only in passing—*Allen, supra* and

Rosado v. Wyman, *supra*. Indeed, these three cases, which are consistent in their analysis with *Cort* and which *Cort* did not purport to disturb, are, taken together, controlling of this case.

In *Allen*, *supra* and *Calhoon*, *supra*, this Court considered provisions analogous to Title IX in that they were directed at the individual rights.³¹ In both cases, the primary inquiry was, as *Cort* later recognized, whether there was express Congressional intent to *deny* the plaintiff the traditionally available judicial remedies.

In *Calhoon*, there was an express provision in the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 3401 *et seq.*, making the statutory remedy exclusive for violation of Title IV's election procedures. 379 U.S., at 137. The traditional judicial remedies were *expressly* foreclosed, and only the Secretary of Labor was authorized to bring suit to protect the rights of individual union members.

³¹In *Calhoon*, the relevant provision stated:

"... every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof." 29 U.S.C. § 481(e) (emphasis supplied).

In *Allen*, the relevant provision stated:

"... and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure . . ." 42 U.S.C. § 1973c (emphasis supplied).

In *Allen*, this Court was, as noted, concerned with the Voting Rights Act—explicitly, with the provision requiring political entities to submit alterations of voting qualifications or procedures to a district court or to the Attorney General. 42 U.S.C. § 1973c. Like Title IX, the provision is expressly directed at the protection of individuals: "No person" could be denied the right to vote for failure to comply with a qualification or procedure unless it had been submitted for review as required by the statute.³² As in Title IX, there is an enforcement mechanism provided in the Voting Rights Act: The Attorney General, upon a complaint, could seek to enjoin the alteration. *Allen*, 393 U.S., at 558 n.21.

After noting that the purpose of the act was to guarantee individuals the right to vote, the Court in *Allen* explored only one question in determining whether private individuals should be allowed to sue to enforce their rights to vote: Is enforcement by the Attorney General sufficient to protect each citizen's right to vote? Given the number of individuals and of political entities, the Court had little trouble in concluding that individuals must be allowed to sue.

Thus, *Calhoon* and *Allen* demonstrate that, as *Cort* later suggested, if a statute expressly creates personal

³²Indeed, in *Allen*, the statutory language and structure are not as closely limited to individuals as in this case. For, while the general purpose of the Voting Rights Act was to protect the right of individuals to be free of racial discrimination in voting, the statutory provision under which the plaintiffs sued was principally a directive to specified political subdivisions to submit proposed enactments affecting voting to a federal court or to the Attorney General of the United States.

rights, private enforcement is available *unless* Congress specifically provides otherwise *or* the statutory enforcement mechanism was plainly designed for and capable of protecting the individual rights guaranteed.

Rosado, supra, establishes the necessary corollary—that provision of a fund termination mechanism as the means of enforcing federal standards for grants is *not* to be construed as either an intention to foreclose private suits or an indication that such suits are fundamentally incompatible with the statutory enforcement scheme.

In *Rosado*, plaintiff welfare recipients sued to enforce a directive in a federal statute to states participating in the Aid to Families with Dependent Children program.³³ The Court concluded they may seek relief. The only question explored was whether the presence of the fund termination mechanism was the exclusive remedy available. In concluding it was not, the Court emphasized the role of federal courts where federal funds are involved:

“It is peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.” *Rosado*, 397 U.S., at 423.

The Court therefore concluded that the existence of fund termination authority does not foreclose private suits.

³³ “[The States shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and . . . any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.” 42 U.S.C. § 602(a)(23).

Thus, *Allen*, *Calhoun*, and *Rosado* together establish that where clearly articulated federal rights are guaranteed to individuals, and fund termination is not an expressly exclusive remedy, it is the duty of federal courts to afford those individuals the traditionally available judicial remedies. These cases inescapably point to the conclusion that individuals should be allowed to sue to protect their federal right to equal educational opportunities despite the existence of a fund termination procedure.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE
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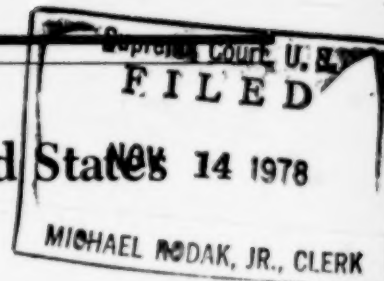
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ON WRIT OF CERTIORARI TO
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**BRIEF OF THE AMERICAN COUNCIL ON EDUCATION
AND
THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES
AS AMICI CURIAE
IN SUPPORT OF NONFEDERAL RESPONDENTS**

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**BRIEF OF THE AMERICAN COUNCIL ON EDUCATION
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AS AMICI CURIAE
IN SUPPORT OF NONFEDERAL RESPONDENTS**

INTEREST OF AMICI

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States (rev. 1971), the American Council on Education and the Association of American Medical Colleges respectfully submit this brief accompanied by written consent of all parties to their participation as *amici curiae* in No. 77-926.

The American Council on Education is a nonprofit corporation organized under the laws of, and located in, the District of Columbia. Founded in 1918, the Council is a membership organization composed of 1,291 nonprofit institutions of higher education from both the public and private sectors and 169 educational associations and organizations. Its work is financed by membership dues, by grants from foundations and learned and professional societies, and by grants from and contracts with the Federal government.

The Council is the nation's major coordinating body in postsecondary education. As an organization whose members include the overwhelming majority of nonprofit four-year colleges and universities, it is uniquely able to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

It is especially appropriate that the Council participate as *amicus curiae* in the instant case because the federal statute at issue (Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*) applies only to *educational* programs and activities receiving Federal financial assistance.¹ Thus the Council's mem-

¹ Title IX is distinguishable from three other federal civil rights statutes (Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Age Discrimination Act of 1975, 42 U.S.C. §§ 1601 *et seq.*) in that the latter encompass all programs and activities receiving Federal financial assistance.

ber institutions operate a substantial portion² of the programs and activities that will be affected by the Court's ruling on the important question presented in this case.

The Association of American Medical Colleges is a nonprofit corporation organized under the laws of the State of Illinois and having its principal place of business in the District of Columbia. Founded in 1876, the Association is a membership organization composed of all 124 accredited and operating nonprofit medical schools in the United States, over 400 teaching hospitals in which undergraduate medical education is conducted, and 63 academic and professional societies, the members of which are actively engaged in medical education, biomedical research and the provision of patient care. Its corporate purpose, the advancement of medical education, is financed by membership dues and through grants and contracts provided by foundations and the Federal government.

The University of Chicago Pritzker School of Medicine and the Northwestern University Medical School are institutional members of the Association. The question presented for resolution in this case has profound implications for the Association's member institutions, in no small measure because medical education in this country is distinguished from nearly all other educational endeavors by the gap that exists between its enormous attractiveness to applicants and the limited number of places available to accommodate them.

QUESTION PRESENTED

The sole question presented in this case is whether

² There were 20,318 school districts and institutions of higher education told by the Department of Health, Education, and Welfare to file assurances of compliance with Title IX by September 30, 1976. *Implied Rights of Action to Enforce Civil Rights*, 87 YALE L.J. 1378, n. 165 (1978).

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, impliedly creates a private right of action, enabling individual claimants to bring civil actions under the statute against school districts and institutions of higher education which receive Federal financial assistance.

ARGUMENT

I. UNDER THE TESTS OF *CORT V. ASH*, NO PRIVATE RIGHT OF ACTION SHOULD BE IMPLIED UNDER TITLE IX.

Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681, reads in relevant part as follows:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

The subsequent two sections establish a comprehensive statutory scheme for federal administrative enforcement of section 901's mandate of nondiscrimination. That scheme requires that, before the single sanction of funds cutoff can be applied, federal agencies and departments must seek voluntary compliance with the nondiscrimination directive and must afford recipients an opportunity for hearing. After a final determination with respect to compliance has been made by an agency or department, judicial review of that determination is expressly authorized.

Despite the detailed consideration given to the question of remedies in Title IX, the statute does not expressly confer upon private citizens the right to bring a civil action in federal court to enforce the statute. Therefore, in determining whether or not such a right should be implied, the court below properly applied

the standards that have been developed by this Court in a long line of cases.³ Those standards were enunciated in *Cort v. Ash*, 422 U.S. 66, 78 (1975), as follows:

First, is the plaintiff "one of the class for whose especial benefit the statute was created,"—that is, does the statute create a Federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a right or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal law? [citations omitted].

In this case there is no question that the female plaintiff is a member of the class for whose benefit the statute was enacted. In fact, section 901 itself includes a provision specifically stating that "...in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education." [emphasis added].

There is also little doubt that the fourth test (whether or not the cause of action is one traditionally relegated to state law) is met in this case, since civil rights legislation has in recent decades been an area of federal initiative.

³ *Cort v. Ash*, 422 U.S. 66 (1975) (refusing to imply a private right of action by a shareholder under 18 U.S.C. § 610, forbidding corporate contributions to presidential campaigns); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (refusing to imply a private right of action by an investor under the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa et seq.); and *National Railroad Passenger Corp. [Amtrak] v. National Association of Railroad Passengers*, 414 U.S. 453 (1974) (refusing to imply a private right of action to enforce the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501 et seq.).

A private right of action should not be implied under Title IX, however, because neither of the two remaining tests set forth in *Cort v. Ash* is met: there is no indication of legislative intent to create such a right, and it is inconsistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.

A. *There is no indication of legislative intent, explicit or implicit, to create a private right of action under Title IX.*

The briefs of the parties and the reported opinions of the court below in this case have dealt extensively with the legislative histories of Title IX and of other statutes which have been said to cast light on Congress' intent in enacting Title IX.⁴ *Amici*, therefore, will not recount those histories here.

As is conceded by the *amicus* brief of the Lawyers' Committee for Civil Rights under Law,⁵ the truth of the matter is that neither Title IX nor its legislative history addresses the question of private enforcement. This fact should be dispositive of the issue under the "legislative intent" test of *Cort v. Ash*. In *Cort*, legislative silence was taken as an indication that no private right should be implied under the campaign contributions statute at issue in that case. And, in his separate opinion in *University of California Regents v. Bakke*, ___ U.S. —

⁴ The court below granted a rehearing of this case in order to determine the effect of the inclusion of Title IX within the provisions of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. Reference has also been made to a statement concerning Title IX in the legislative history of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. See Summary of the Committee Substitute [Amendment of Section 504], 120 CONG. REC. 30534 (1974), discussed in *Implied Rights of Action*, *supra*, n. 148.

⁵ "The legislative history of Title IX contains no expression of support for or opposition to private rights of action . . ." Brief, p. 8.

—, No. 76-811 (decided June 28, 1978), Justice White gave weight to the legislative silence with respect to private enforcement of Title VI of the Civil Rights Act of 1964:

But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other titles of the Act, intended silently to create a private cause of action to enforce Title VI. (slip op. at 3).

The court below likewise found the legislative history of Title IX silent and properly followed established precedent in interpreting the legislative silence as supporting its conclusion that no private right of action exists. 559 F. 2d 1077, 1081-1082 (1977).

Moreover, an examination of recent legislative action amending another, similarly structured, civil rights statute demonstrates that Congress is well aware of the enforcement issue and that it could have amended Title IX expressly to create a private right of action had that been its intention.

The Age Discrimination Act of 1975, 42 U.S.C. §§ 1601 *et seq.*, prohibits discrimination on the basis of age in federally-assisted programs and activities. The Act's operative section (§ 303, 42 U.S.C. § 6103) is worded similarly to that of Title IX:

No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In its original form, the Act dealt with the enforcement question by stating, "The provisions of this section shall be the exclusive remedy for the enforcement of the provisions of this title." § 305(e), 42 U.S.C. § 6105(e). In 1978, however, Congress voted to delete § 305(e) and to substitute two new subsections ex-

pressly recognizing a private right of action.⁶ The report of the Committee on Education and Labor, in a section entitled "Private Right of Action to Enforce Act," stated that it was the purpose of the House's version of the new provision "to provide that any interested person may bring an action in an appropriate district court of the United States to enjoin any violation of such act by any program or activity receiving Federal financial assistance." H.R. REP. NO. 1150, 95th Cong., 2d Sess. 40 (1978). The Senate version of the bill did not address this issue, S. REP. NO. 855, 95th Cong., 2d Sess. (1978), and the conference agreement accepted the House

⁶ (e)(1) When any interested person brings an action in any United States district court for the district in which the defendant is found or transacts business to enjoin a violation of this Act by any program or activity receiving Federal financial assistance, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health, Education, and Welfare, the Attorney General of the United States, and the person against whom the action is directed. Such interested person may elect, by demand for such relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of suit, including a reasonable attorney's fee, to the prevailing plaintiff.

(2) The notice referred to in paragraph (1) shall state the nature of the alleged violation, the relief to be requested, the court in which the action will be brought, and whether or not attorney's fees are being demanded in the event that the plaintiff prevails. No action described in paragraph (1) shall be brought (A) if at the time the action is brought the same alleged violation by the same defendant is the subject of a pending action in any court of the United States; or (B) if administrative remedies have not been exhausted.

(f) With respect to actions brought for relief based on an alleged violation of the provisions of this title, administrative remedies shall be deemed exhausted upon the expiration of 180 days from the filing of an administrative complaint during which time the Federal department or agency makes no finding with regard to the complaint, or upon the day that the Federal department or agency issues a finding in favor of the recipient of financial assistance, whichever occurs first. [Reprinted in Conference Report, H.R. REP. NO. 1618, 95th Cong., 2d Sess. 47 (1978).]

version, with certain modifications. *See* Conference Report, H.R. REP. NO. 1618, 95th Cong., 2d Sess. 87 (1978).

Thus, Congress in 1978 demonstrated its awareness of the issues surrounding the authorization of a private right of action under a civil rights statute enacted some years previously, and it resolved the question through appropriate statutory language. In view of this renewed legislative attention to the general issue, there is no need for this Court, under the rubric of ascertaining the original legislative intent, to imply a right which was not contemplated by Congress in 1972. Rather, sound public policy requires that the matter be resolved in the legislative arena through the normal political process.

B. Implication of a private right of action under Title IX would be inconsistent with the underlying purposes of the legislative scheme.

A second test set forth in *Cort v. Ash*, *supra*, and not met with respect to Title IX is whether implication of a private right of action would be consistent with the underlying purposes of the legislative scheme. Title IX contains an elaborate scheme for administrative enforcement which includes required voluntary compliance efforts, an opportunity for hearing, and other procedural restrictions. Regarding Title VI of the Civil Rights Act of 1964, after which Title IX was modelled, Justice White stated in his separate opinion in *University of California Regents v. Bakke*, *supra*:

If the Federal Government may not cut off funds except pursuant to an agency rule, approved by the President, and presented to the appropriate committee of Congress for a layover period, and after voluntary means to achieve compliance have failed, it is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites themselves. (slip op. at 4-5).

It is likewise inconceivable that Congress intended to permit individuals to circumvent the administrative prerequisites of Title IX.

In addition to the administrative remedies set forth in Title IX, due regard should also be given to other statutes in the overall legislative scheme to ensure that individuals are not subjected to discrimination on the basis of sex. Institutions of higher education are covered by Title IX, in their capacity as recipients of Federal financial assistance; by Executive Order 11246, 3 C.F.R. 339-48 (1964-comp.), *as amended by* Executive Order 11375, 32 Fed. Reg. 14,303 (1967), in their capacity as contractors with the federal government; and by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206, in their capacity as employers. In view of these four separate federal mandates of nondiscrimination on the basis of sex, remedies should not be expanded beyond those expressly provided by any one mandate, in the absence of compelling justification.

That there is no such justification becomes quite apparent through an examination of the interplay of Title IX and Title VII. Title VII is the major federal statute requiring nondiscrimination on the basis of sex by employers. Although Title IX was intended to prohibit discrimination on the basis of sex among beneficiaries of federally-assisted educational programs and activities, the regulations promulgated thereunder include several sections dealing with employment practices. 45 C.F.R. §§ 86.51-86.61. Notwithstanding the fact that every court that has considered the question has held those sections invalid,⁷ the Department of

⁷ *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (E.D. Mich., April 7, 1977); *Seattle University v. HEW*, 16 EPD ¶ 8241 (W.D. Wash., Jan. 3, 1978); *McCarthy v. Burkholder*, 17 EPD ¶ 8454 (D. Kan., Feb. 2, 1978); and *Brunswick School Board v. Califano*, 16 EPD ¶ 8242 (D. Me., April 13, 1978).

Health, Education and Welfare is continuing to enforce them in jurisdictions not subject to an injunction, pending the outcome of appeals in each case.

If the employment sections of the regulations are upheld, and if a private right of action is implied under Title IX, the anomalous result will be that employers which are school districts or institutions of higher education will be more vulnerable to lawsuits alleging sex discrimination than other employers which are subject only to Title VII. (Under Title VII, 42 U.S.C. § 2000e-5(f)(1), individual complainants must file an administrative complaint with the Equal Employment Opportunity Commission and, after passage of a set time, receive a "right-to-sue" letter before bringing a civil action in federal district court.) There is no evidence in the legislative history of either statute to indicate that Congress intended to render educational employers more exposed to spontaneous litigation for the resolution of grievances than other employers in the public and private sectors.

If, on the other hand, the employment sections are not upheld, and if a private right of action is implied under Title IX, an even more anomalous result would obtain in that individuals protected by Title IX (principally students and applicants for admission) would have readier access to the courts than individuals protected by Title VII (employees). For the reasons outlined in Part II of this brief, it is highly unlikely that Congress intended such a result.

Both of these anomalies can be avoided by declining to imply a private right of action under Title IX, thus leaving the legislative scheme established by Congress intact as the sole means of enforcing rights granted by the statute.

II. IN A DECISION WHETHER TO IMPLY A PRIVATE RIGHT OF ACTION UNDER TITLE IX, WEIGHT SHOULD BE GIVEN TO THE COUNTERVAILING CONSTITUTIONAL INTEREST IN ACADEMIC FREEDOM.

To the extent that this Court looks outside Title IX and its legislative history for guidance in determining whether to imply a private right of action under Title IX, the well-established constitutional interest in academic freedom should not be overlooked. "Academic freedom" in the traditional sense has been defined⁸ as follows:

Academic freedom is the freedom of the teacher within his or her field of study. It is a safeguard that allows researchers and teachers in institutions of higher learning to pursue their work without the inhibition, prohibition, or direction of political, ecclesiastical, or other administrative authorities, regardless of their personal philosophies, behavior, or life-style. It is a liberty granted to these individuals to assure them the opportunity for examination and challenge of doctrines, dogma, and received opinions in the interest of advancing knowledge for the benefit of all society.

Academic freedom has long been a major tenet of our American democratic faith. It, like other such tenets, is embedded in our constitutional law. Academic freedom has been construed to encompass a variety of elements: freedom to provide instruction in a foreign language (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); freedom to express unpopular political beliefs in the classroom (*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)); freedom to refuse to take a loyalty oath (*Keyishian v. Board of Regents*, 385 U.S. 589 (1966)); freedom to teach religiously unorthodox scientific theories (*Epperson v. Arkansas*, 393 U.S. 97 (1968)); and freedom of

⁸ "Academic Freedom," entry in Knowles, ed., *The International Encyclopedia of Higher Education* (San Francisco: Jossey-Bass, 1977), Vol. 2A, p. 24.

students to organize an education-related extracurricular activity (*Healy v. James*, 408 U.S. 169 (1972)).

Academic freedom in its purest sense must be grounded in the freedom of academic institutions to fulfill their missions of teaching, research and service in an environment free of governmental interference with matters of educational policy. Justice Frankfurter acknowledged this necessity when he described "the four essential freedoms" of a university as "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, *supra*, at 263.

In its recently completed term, this Court decided two cases, both involving medical schools, which reaffirm the constitutional interest in academic freedom under the First Amendment and the due process clause of the Fourteenth Amendment. In *Board of Curators of the University of Missouri v. Horowitz*, ___ U.S. ___ No. 76-695 (decided March 1, 1978), the due process clause was held not to require a formal hearing in cases of dismissal on academic grounds. And, in *University of California Regents v. Bakke*, *supra*, Justice Powell, in finding the attainment of a diverse student body a constitutionally permissible goal under the equal protection clause, looked to the First Amendment's well-established concern for academic freedom. The Court's discussions in those cases of the appropriateness of judicial deference to educators on educational matters are of direct relevance to the question presented in the instant case.

In *Horowitz*, a student in her final year of medical school at a state university was dismissed for failure to meet required academic standards with respect to clinical practice. She brought suit under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging that the school's failure to grant her a hearing prior to her

dismissal violated her rights under the due process clause of the Fourteenth Amendment. In holding that a formal hearing was not required under the circumstances of the case, the Court distinguished between dismissals for disciplinary cause, *Goss v. Lopez*, 419 U.S. 565 (1975), and dismissals for academic cause:

The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions present in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, *the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.* [emphasis added]. (slip op. at 11).

In his concurring opinion, Justice Powell made a similar point: "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." (slip op. at n. 6).

Amici submit that academic judgments concerning admission, evaluation, and dismissal are ideally within the sole purview of university faculties. Nevertheless, it is recognized that an individual's civil rights (including the right to be free of discrimination on the basis of sex) are of a dignity to require that academic decisions affecting those rights be reviewable. Such review, however, must be limited to assuring that decisions are based on academic considerations, and not on capricious, academically irrelevant, or morally and legally reprehensible grounds. This limited constraint on academic autonomy can be effected least intrusively and least dangerously by entrusting enforcement of the law to an administrative agency which has expertise in

educational matters, with a mandate that efforts to achieve voluntary compliance precede any formal enforcement proceedings. This is precisely what Congress has done in establishing the enforcement scheme for Title IX, which should not now be supplemented by private civil actions.

In warning against "judicial intrusion into academic decisionmaking," the majority opinion in *Horowitz* stated, "Courts are particularly ill-equipped to evaluate academic performance. . . . We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship." (slip op. at 12-13). Since Title IX was primarily, if not exclusively,⁹ intended to ensure nondiscrimination on the basis of sex among beneficiaries of federally-assisted educational programs and activities, students and applicants for admission are the principal parties protected by the statute. If a private right of action is implied under Title IX, many of the cases which will have to be decided by the federal courts will involve academic evaluations.¹⁰ This would portend precisely the situation the Court was seeking to avoid in *Horowitz*.

Even closer to the facts of the instant case is

⁹ Whether or not Title IX covers the employment practices of educational institutions is currently disputed. See discussion above at pp. 9-10 and n. 7.

¹⁰ Such an action is already in progress in *Alexander v. Yale University*, Civil No. 77-277 (D. Conn.), where a female student claims that the university refused to act on her complaint that a low mark in her major field of study resulted from her rejection of the course instructor's sexual advances. Following denial of the university's initial motion to dismiss, plaintiff's ensuing application for a temporary injunction went off the court's calendar without formal hearing when the parties agreed to the university's dispatching letters to law schools to which plaintiff had applied advising that the validity of the political science grade in question was being contested in a lawsuit. See Rulings of U.S. Magistrate dated Dec. 21, 1977 and June 30, 1978.

University of California Regents v. Bakke, supra, which was an action brought by an unsuccessful applicant to a state university medical school who alleged that he had been the victim of discrimination on the basis of race in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. In finding that the attainment of a diverse student body is a constitutionally permissible goal under the equal protection clause, Justice Powell looked to the First Amendment's concern for academic freedom:

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. (slip op. at 42).

Justice Powell went on to state that, although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. And, in *Bakke*, the university's medical school admissions system was found to have exceeded those constitutional limitations.

In the present case, statutory rather than constitutional limitations protecting individual rights may not be disregarded. *Amici* are not urging that statutory limitations be disregarded, but rather that, in defining and interpreting those limitations, the Court be mindful of the countervailing constitutional interest in the integrity of the academic enterprise.

III. BROAD POLICY CONSIDERATIONS DO NOT FAVOR IMPLICATION OF A PRIVATE RIGHT OF ACTION UNDER TITLE IX.

If this Court finds it necessary to look beyond Title IX, its legislative history, the legislative histories of related statutes, and constitutional principles in order to

decide whether a private right of action should be implied under Title IX, broad considerations of public policy require that no such right be implied.

A. Private actions would result in differing, and possibly inconsistent, interpretations of Title IX and the regulations promulgated thereunder.

Title IX's operative section consists of a single sentence mandating nondiscrimination on the basis of sex in federally-assisted educational programs and activities, with certain delineated exceptions. 20 U.S.C. § 1681(a). Regulations promulgated under Title IX comprise eight pages of fine print in the Code of Federal Regulations, 45 C.F.R. §§ 86.1-86.71, and cover all aspects of a university's operations, including admissions, financial aid, housing, athletic programs, and employment. Enforcement of the regulations has been entrusted to the Department of Health, Education and Welfare's Office for Civil Rights (OCR).

The Title IX regulations do not contain rigid formulas as to what constitutes compliance. Rather, they are imbued with the notion of reasonableness throughout. For example, in the troublesome area of intercollegiate athletics, any institution offering athletic scholarships "must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics." 45 C.F.R. § 86.37(c)(1). HEW has interpreted this provision as meaning that "neither quotas nor fixed percentages of any type are required . . . [T]he institution is required to take a reasonable approach in its award of athletic scholarships, considering the participation and relative interests and athletic proficiency of its students of both sexes."¹¹ By taking such an ap-

¹¹ Office for Civil Rights, Department of Health, Education and Welfare, Memorandum on Elimination of Sex Discrimination in Athletic Programs (Sept. 1975).

proach, HEW is able to maintain substantial discretion and flexibility in enforcing Title IX.¹² If, however, a private right of action is implied, and individual complainants are permitted to by-pass OCR's administrative enforcement procedures, differing views of what is "reasonable" can be expected, and there will be little hope for that uniformity of interpretation which all agree is desirable.

B. The Department of Health, Education and Welfare has greater expertise in handling complex educational matters than the federal judiciary.

In the instant case, petitioner was one of 5,427 persons who applied for the 104 positions available in the 1975 entering class at The University of Chicago Pritzker School of Medicine. As was amply demonstrated to this Court in the numerous *amicus* briefs filed in the case of *University of California Regents v. Bakke, supra*, the admissions process in medical education and in higher education generally is a complex and highly sophisticated process. *Amici* believe that any policing of that process necessary to ensure equal educational opportunity can best be performed by an executive department staffed with experienced professionals who are familiar with the operation of institutions of higher education. The court below correctly noted this underlying rationale for the doctrine of primary jurisdiction and concluded: "In this case we believe that the HEW is in a much better position to evaluate the statistics of the applicant and entering classes at the various medical schools. In addition, HEW has the benefit of comparing the local practice to the admission policies on a national level." 559 F. 2d 1063 at n. 17.

¹² See Comment, *Sex Discrimination in Athletics*, 29 ALA. L. REV. 390, 411 (1978) and Cox, *Intercollegiate Athletics and Title IX*, 46 G.W. L. REV. 34, 49 (1977).

Declining to imply a private right of action couples the advantage of relying on HEW's greater expertise in educational matters with the concomitant and not inconsequential benefit of conserving the resources and energy of the judiciary. As the court below stated, "Considering our already overburdened system we fail to see why we should stretch a statute by judicial interpretation to the point where it would allow additional litigation which we may not be able to properly accommodate." 559 F. 2d 1063, 1075.

C. Excessive litigation would constitute a drain on the resources of hard-pressed colleges and universities.

Amici in support of petitioner urge that, because HEW's Office for Civil Rights has been unable to keep current in its processing of Title IX complaints, a private right of action should be implied to enable individual complainants to sue educational institutions which allegedly have not complied with the Title IX regulations. Failure of a governmental agency to carry out its charge, however, should be of no relevance in ascertaining whether Congress intended for colleges and universities to be subject to civil actions brought by private individuals to enforce Title IX.¹³

Implication of a private right of action under Title IX could result in a host of new lawsuits against colleges and universities under three federal civil rights

¹³ Private individuals may avail themselves of the judicial review procedures set forth in Title IX in the event that they are dissatisfied with a final decision on their complaint by HEW. And, in the event that HEW has made no decision after passage of an undue length of time, such persons may seek injunctive relief against HEW in the federal district courts, as was done in *Women's Equity Action League v. Califano*, Civil Action No. 74-1720 (D.D.C., orders dated June 14, 1976 and October 26, 1977).

statutes.¹⁴ Under such circumstances the potential for litigation over admissions decisions and academic evaluations would be virtually limitless.¹⁵ The consequence could be a serious depletion of the resources of educational institutions, resources which might better be used in meeting educational objectives. As one university president recently wrote in the alumni magazine of the Massachusetts Institute of Technology:¹⁶

Aside from the merits of any particular case, the overriding fact is clear that the hands of all administrators are increasingly tied by real or potential legal issues. I find I must consult our lawyers over even small, trivial decisions. The university has so many suits against it (40 at last count) that my mother now calls me, "My son, the defendant."

The courts and the law are, of course, necessary to protect individual rights and to provide recourse for negligence, breach of contract, and fraud. But a "litigious society" presents consequences that nobody bargained for, not least the rising, visible expense of legal preparation plus the invisible costs of wasted time.

A private right of action should not be implied under Title IX in the absence of a Congressional finding that it is in the national interest for colleges and universities,

¹⁴ Title IX of the Education Amendments of 1972; Title VI of the Civil Rights Act of 1964; and Section 504 of the Rehabilitation Act of 1973.

¹⁵ For the academic year 1977-78 alone, 40,569 applicants submitted 371,545 applications (an average of 9.16 applications each) in competition for the 15,493 available first year places in 119 medical schools. *Datagram: Applicants for 1977-78 Medical School Class*, 53 J. MED. ED. 698 (August, 1978). Thus, 25,076 applicants were each rejected by an average of nine medical schools, creating a total of approximately 229,700 adverse decisions which would be directly reviewable by Federal courts.

¹⁶ Bennis, *Where Have All the Leaders Gone?* 79 TECHNOLOGY REV. 5 (March/April, 1977).

especially those within the private sector,¹⁷ to expend increasing shares of their limited resources for litigation costs.

¹⁷ The briefs of the parties in this case give considerable attention to the different postures of public and private institutions that would result if no private right of action is implied under Title IX. Public institutions could be sued under 42 U.S.C. § 1983 for violation of rights secured by law, presumably including Title IX. Private institutions, on the other hand, would not be subject to civil actions alleging violation of Title IX. In *Alexander v. Yale University, supra*, a federal magistrate noted this disparity: "... it could hardly be a principled distinction that one student would be at Yale and another at the University of Connecticut; if the state college student can secure judicial relief under § 1983, the more reason to imply a suit right [sic] for the identically situated private university student..." (slip op. at 9, Dec. 21, 1977).

Amici find such an argument unstudied, since it fails to take into account the multitude of ways in which the legal status of public and private colleges differ. In fact, such a distinction can be found in Title IX itself. (20 U.S.C. § 1681(a)(1) provides that, with respect to admissions at institutions of undergraduate higher education, only public institutions are covered). There are dramatic differences in the Fourteenth Amendment due process rights to which students are entitled, depending upon whether they attend public or private institutions. See O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970), and Hendrickson, "State Action" and *Private Higher Education*, 2 J. OF LAW AND EDUC. 53 (1973). Courts have been steadfast in preserving the "state action" requirement of 42 U.S.C. § 1983. *Cohen v. I.I.T.*, 524 F. 2d 818 (7th Cir. 1975); *Greco v. Orange Memorial Hospital*, 513 F. 2d 873 (5th Cir., 1975); and *Blackburn v. Fisk University*, 443 F. 2d 121 (6th Cir. 1971). And several federal statutes cover one sector but not the other, such as the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (covers only private institutions) and the minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (covers only private institutions).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the judgment of the court below.

Respectfully submitted,

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November, 1978

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MICHAEL BODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1978

No. 77-926

GERALDINE G. CANNON,
Petitioner,
v.

THE UNIVERSITY OF CHICAGO, *et al.,*
Respondents.

GERALDINE G. CANNON,
Petitioner,
v.

NORTHWESTERN UNIVERSITY, *et al.,*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF YALE UNIVERSITY
AS AMICUS CURIAE

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STATEMENT OF INTEREST*

Yale University is a private nonprofit institution of higher education. It was founded in 1701, and today consists of an undergraduate school, a graduate school of arts and sciences, and ten professional schools at the graduate level.

Yale educates both men and women in all its schools and departments. Women have been admitted to the Yale Graduate School since 1892, to the Yale Law School since 1918, and to most of the other professional schools for several decades. Yale's historically all-male undergraduate school first admitted women in 1969, and women

* The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 42(2).

presently account for approximately 37% of the total number of undergraduate students.

Yale receives federal financial assistance in many of its education programs and activities and is subject, in regard to such programs and activities, to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"). Yale is the defendant in a civil action pending in the District Court for the District of Connecticut, in which the plaintiff's sole claim of a federal cause of action is that private remedies are implied under Title IX.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner claims a private right of action under Title IX, although the statute does not expressly confer such a right. Petitioner argues, under the criteria stated in *Cort v. Ash*, 422 U.S. 66 (1974), that a private right of action is implied. The respondents, the University of Chicago and Northwestern University, argue that a private right of action is not implied. Yale agrees with the respondents that Title IX implies no private right of action.

Title IX was enacted by Congress in the exercise of its spending power. Ever since this Court's decision in *United States v. Butler*, 297 U.S. 1 (1935), it has been clear that there are limits to the authority of Congress to condition the expenditure of appropriations. This Court has not had occasion to define precisely the limits on the exercise of the spending power, but it has never been doubted that such limits exist. One such limit, perhaps the plainest, is that the spending power may not be employed to accomplish an end inconsistent with some other Constitutional provision.

Congress has recognized that there are uncertain limits on the exercise of its spending power, and it has sought not

to go beyond them. For example, it has been careful in legislation, like Title IX, affecting educational institutions to avoid undue interference with the principle of academic freedom, which "long has been viewed as a special concern of the First Amendment."¹ Furthermore, it has not, in any legislation having its basis in the spending power, purported to confer upon private persons individual rights of action to enforce compliance with the conditions imposed by the legislation.

Cort v. Ash was concerned with a statute applicable to Presidential elections. The cases on which the Court relied in setting forth the factors "relevant" to the implication question involved for the most part statutes enacted by Congress under the commerce power. None of them involved a law enacted under the spending power.

The factors "relevant" under *Cort v. Ash* may also be "relevant" to whether a private right of action is implied under a statute grounded in the spending power, although it has never been so decided. But those factors must be examined, in regard to a spending power statute, with an overriding awareness that Congress, in enacting the statute, has not claimed for itself the substantive power to legislate in the field. Since Congress has never expressly conferred a private right of action under a spending power statute, the Court should not easily find that one is implied.

Implication of a private right of action under Title IX would involve the courts in claims of a type which Congress did not intend the Courts to adjudicate and which are more appropriate for administrative resolution. The description in this brief of litigation currently pending in the District of Connecticut will demonstrate the hazards of too easily accepting the implication of a private right of action.

1. *Regents of University of California v. Bakke*, 98 S.Ct. 2733, 2760 (1978).

ARGUMENT

I.

Congress Recognizes the Limitations upon the Spending Power and has not Used it to Confer Private Rights of Action.

Title IX provides that no person shall be subjected to discrimination on the basis of sex in education programs or activities receiving Federal financial assistance. The statute was patterned directly on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI").²

At least insofar as they relate to private institutions of higher education, Title VI and Title IX are without precedent. Congress had never before intervened in the relationship between a private university and its students. The broad reach of the statutes was acknowledged by a sponsor of Title IX, Senator Bayh, during the Senate debate on the measure.

I doubt very much whether even one institution of higher education today, private or public, is not receiving some Federal assistance. 117 Cong. Rec. 30408 (Aug. 6, 1971).

Because it was intervening in areas traditionally left to state or private ordering, Congress was concerned about the basis of its powers. It found the authority to legislate in the spending power. During the debates on the 1964 Civil Rights Act, Congressman Celler, a sponsor of the legislation, included in the Record a series of memoranda dealing with the constitutionality and legality of various titles of the measure. The memoranda clearly indicate that, unlike the other titles of the Civil Rights Act, which were

2. 117 Cong. Rec. 30407-08 (Aug. 6, 1971) (Remarks of Senator Bayh).

based on Congressional power under the commerce clause and the Thirteenth, Fourteenth and Fifteenth Amendments, Title VI was grounded in the spending power. 110 Cong. Rec. 1521-1528 (Jan. 31, 1964). Discussing the legality of Title VI, one memorandum states:

Title VI is not an exercise of regulatory authority over activities within the States. Its application is confined to programs and activities which receive Federal financial assistance, by way of grant, loan, or contract and its validity rests on the power of Congress to fix the terms on which Federal funds will be made available. 110 Cong. Rec. 1527.

Title IX merely added the word "sex" to existing law (Remarks of Senator Bayh, 117 Cong. Rec. 30408). Its Constitutional basis is also the spending power. Congressional reliance on the spending power as the Constitutional authority for Titles VI and IX is recognized by the federal respondents (Brief, pp. 29-30).

The spending power is created by Article I, §8, Clause 1 of the Constitution:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

In *United States v. Butler*, 297 U.S. 1 (1935), this Court considered the scope of the spending power. The Court accepted the Hamiltonian view, holding that the power to provide for the general welfare is a power to spend federal moneys for any purpose Congress deems to be in the general welfare of the United States. In other words, the power to provide for the general welfare is neither an independent grant of regulatory authority unrelated to expenditures nor a limited grant of authority confined to expendi-

tures in aid of the specifically enumerated powers of Congress.

Having accepted the Hamiltonian position, which essentially permits Congress to fix by statute the conditions upon which moneys shall be expended, the *Butler* Court then limited the spending power by holding that Congress could not use the power to "purchase" a compliance which it is powerless to command. Referring by way of example to appropriations in aid of education, the Court noted:

There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. 297 U.S. at 73.

While the *Butler* distinction may be less obvious than the Court assumed, there is no question that Congress has understood that there are constitutional limitations upon its authority to condition the expenditure of appropriations. Such limitations were acknowledged by Mr. Justice Stone, in his dissent in *Butler*, and have been recognized by this Court in later decisions. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947).

In enacting Title VI of the Civil Rights Act of 1964, Congress relied on three statutes as precedents for its authority under the spending power to attach conditions to grants of financial assistance by means of such across-the-board legislation: the Work Hours Act of 1962 (40 U.S.C. § 327 *et seq.*), the Anti-Kickback Act of 1934 (18 U.S.C. § 874), and the Hatch Act (5 U.S.C. § 1501 *et seq.*)³ Each of those statutes creates conditions which are to be included in federal grants or contracts and provides for executive enforcement of those conditions. None creates private judicial remedies.

3. 110 Cong. Rec. 1527, 2467 (Jan. 31, Feb. 7, 1964)

The Hatch Act prohibits certain types of political activity by federal employees and by state or local employees whose employment is financed with loans or grants from the United States. It is enforced by the United States Civil Service Commission. The Commission determines whether a violation of the Act has occurred. If it finds a violation it may order the removal of the employee involved and may order amounts based on the salary of that employee withheld from future federal grants to the State.

The Anti-Kickback Act of 1934 prohibits certain types of payments in connection with federal contracts and establishes criminal penalties for its violation. It was expanded in 1946 to provide civil remedies on behalf of the United States. (41 U.S.C. § 51 *et seq.*)

The Work Hours Act of 1962 is one of a group of statutes in which Congress has regulated wages and hours under the spending power. It, along with the Walsh-Healy Public Contracts Act (41 U.S.C. § 35 *et seq.*) and the Davis-Bacon Act (40 U.S.C. § 276a *et seq.*), establishes wage and hour standards for the employees of contractors providing materials or performing work on projects for the Federal Government or financed with Federal funds. The statutes provide for enforcement by the executive branch and do not create new private judicial remedies.⁴ In contrast to these spending power wage and hour statutes, the Fair Labor Standards Act, 29 U.S.C. § 207 *et seq.*, in which Congress regulated wages and hours under the commerce power, does provide an express private right of action.

4. The Work Hours Act and the Davis-Bacon Act do recognize the private rights of action which exist under the Miller Act, 40 U.S.C. § 270a. The Miller Act requires the contractors for public buildings or works to supply payment bonds and provides a right of action for unpaid laborers and materialmen on those bonds. The action is brought in the name of the United States for the private parties. Before individual claims based on the Work Hours Act can be asserted in a private lawsuit under the Miller Act, however, there must be an administrative determination of the validity and amount of such claims and of the fact that amounts withheld by the Federal Government are inadequate to pay the claims. 40 U.S.C. § 330(a), (b).

Where Congress uses its spending power to create across-the-board conditions upon appropriations, it ordinarily requires the executive branch to determine when a condition has been violated and to seek enforcement of the condition. Congress requires similar executive oversight and enforcement in statutes creating conditional grants-in-aid. See, for example, 42 U.S.C. § 1316, which establishes a procedure for a determination by the Secretary of Health, Education and Welfare whether various state social security plans for which the states receive federal funds conform to federal requirements. Congress has not created private rights of action to challenge the state plans.⁵

Title IX conforms to this model. The statute states a general condition to be included in federal grants or contracts, 20 U.S.C. § 1681, and sets out the remedies available to the federal government to enforce that condition, 20 U.S.C. § 1682. It contemplates executive enforcement, but not litigation by third parties. The ultimate remedy is the withholding of future federal funds.

II.

When a Statute is Based on the Spending Power, a Private Right of Action is Not Ordinarily Implied.

In laws based upon its spending power, Congress has never expressly conferred private rights of action to enforce conditions attached to appropriations. Accordingly, the

5. On occasion this Court has permitted a recipient of benefits to challenge a state regulation in the federal Courts on the ground that the state regulation does not conform to federal requirements. See, e.g., *King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970). As this Court has explained those cases, however, they are not private rights of action arising directly under a spending power statute but are actually Constitutional claims arising under the Supremacy Clause. *Hagans v. Lavine*, 415 U.S. 528, 549 (1974). In those cases, 42 U.S.C. § 1983 creates the private right of action.

courts should be less ready than in other cases to find that such rights are implied.

Congressional power to tax and spend is potentially so broad as to reduce the doctrine of enumerated powers to meaninglessness. As the *Butler* case indicates, it is difficult for the courts to define clearly any limits to that power. Yet, Congress has historically recognized some limitations on its use of expenditures to accomplish regulation. Indeed, as Mr. Justice Stone suggested in *Butler* by his reference to "the conscience and patriotism of Congress and the Executive,"⁶ the most effective limits on the spending power may be the political considerations inherent in the legislative process.⁷ To permit a private right of action in the absence of a clear statement from Congress and to expand the spending power by inference would be to frustrate those political restraints.⁸

The *Cort v. Ash* tests for determining whether a private remedy is implicit in a statute not expressly conferring one were developed in cases arising under various regulatory statutes. None of those cases involved a statute based in the spending power. It is not necessary to conclude, however, that the factors "relevant" to the implication question

6. 297 U.S. at 87.

7. See L. Tribe, *American Constitutional Law*, §§ 5-7, 5-10 (1978).

8. This Court recently refused to expand by inference another area of Congressional power in *Santa Clara Pueblo v. Martinez*, 98 S.Ct. 1670 (1978). While noting that Congress had plenary authority to regulate the powers of local self-government which Indian tribes possess, the Court refused to infer a private right of action under the Indian Civil Rights Act in the absence of a clear statement from Congress. 98 S.Ct. at 1684. The Court required a clear indication of Congressional intent even though the failure to infer a private action effectively deprived Martinez of any remedy. See dissenting opinion of Mr. Justice White, 98 S.Ct. at 1689, text at Note 6. Of course, a refusal to infer a private right of action under Title IX would not leave petitioner without a remedy. Congress has provided administrative remedies for the enforcement of Title IX.

under *Cort v. Ash* are not relevant where the statute is grounded in the spending power. On the contrary, it may be assumed that, if ever a private remedy is to be implied under spending power legislation, the factors enumerated in *Cort v. Ash* would be relevant.

However, if the *Cort v. Ash* criteria are to be applied in regard to spending power legislation, they should be applied only with an overriding awareness that the legislation is spending power legislation, for which no other constitutional basis is claimed by Congress. With that awareness, the courts should perceive Congressional silence not as an equivocal circumstance, but as an affirmative indication of an intent *not* to create a private remedy. This is as it should be. Under our Constitution, the courts should not discourage Congressional self-restraint under the spending power, which is potentially so broad, and the limits of which are so difficult to define.

Congressional self-restraint is one of the limits on the spending power. Another of the limits is that Congress may not employ the spending power to accomplish an end inconsistent with some other constitutional provision.⁹ Academic freedom has "long been viewed as a special concern of the First Amendment."¹⁰ It encompasses the freedom of a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹¹

In enacting Title IX, Congress recognized that it was permitting some intrusion upon academic autonomy, and it was therefore careful to make the intrusion as small as

9. *Flast v. Cohen*, 392 U.S. 83, 104 (1967); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976).

10. *Regents of University of California v. Bakke*, 98 S.Ct. 2733, 2760 (1978).

11. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring in result).

the accomplishment of its purposes would permit.¹² It provided for enforcement of the law by an administrative agency having expertise in educational matters. It directed that efforts to achieve voluntary compliance precede any formal enforcement proceedings.

As the briefs of petitioner and various *amici* suggest, a private remedy may differ substantially in kind from the remedies expressly authorized by Congress.¹³ Certainly a private right of action would frustrate the statutory requirement¹⁴ (and therefore the legitimate expectation of recipients of funds) that the parties attempt to arbitrate or conciliate their differences before formal enforcement efforts are commenced. In addition, private rights of action would differ from administrative enforcement in expense and potential multiplicity.¹⁵

Even if Title IX were not based on the spending power, the inconsistency with the legislative scheme of implying a private right of action would be basis enough, under *Cort v. Ash*, to reject the implication. In the context of the spend-

12. See remarks of Representative Erlenborn, 117 Cong. Rec. 39248-9 (Nov. 4, 1971), whose amendment limiting the proposed bill was subsequently agreed to by the House.

Mr. Chairman I offer this amendment to preserve the swiftly eroding right of the colleges and universities of America. We must view title X [which ultimately became Title IX] for what it plainly is just one more giant step toward involvement by the Federal Government in the internal affairs of institutions of higher education. The constant danger is that all too often Federal involvement in the internal affairs of institutions is but the first step toward ultimate Federal control.

13. Brief of petitioner, p. 11; Brief *Amici Curiae* of Federation of Organizations for Professional Women, et al, p. 26; Brief *Amici Curiae* of National Urban League, et al, p. 11; Brief *Amici Curiae* of Lawyers' Committee for Civil Rights under Law, pp. 19-20.

14. See the proviso to 20 U.S.C. § 1682.

15. The federal respondents identify 55 million potential plaintiffs at 97,000 institutions. Brief of Federal Respondents, pp. 49-50.

ing power, however, and Congress' traditional reliance upon governmental enforcement of the conditions of appropriations, the conclusion that no private remedy is implied is inescapable. It is simply inconceivable that Congress intended through Title IX to involve the federal courts in the subjective evaluations and judgments implicit in the relationship between universities and their students.

III.

To Infer a Private Right of Action Under Title IX Would Require the Courts to Adjudicate Claims for which Congress Intended Administrative Enforcement and for Which Administrative Resolution is More Appropriate.

In deciding whether to infer a private cause of action, the court should consider the nature of claims which federal courts might be required to adjudicate. To demonstrate that Title IX claims are more appropriate for administrative resolution, Yale offers as an example the claims in *Alexander, et al v. Yale University* (N 77-277, D. Conn.).¹⁶

Five named plaintiffs, later by amendment increased in number to seven, in 1977 commenced a purported class action under Title IX on behalf of students and faculty affected by allegedly inadequate processing by the university of complaints of "sexual harassment". The allegations of each named plaintiff were contained in a separate count. The first plaintiff, a recent graduate of Yale College, alleged that she had been subjected to sexual advances, "including

16. Federal respondents have misconstrued the current posture of this case. See Brief of Federal Respondents, p. 18. As of this date, the District Court has not yet decided the private right of action question, but is currently considering evidence presented at a court-ordered hearing on the adequacy in fact of the administrative remedy. Moreover, if the federal respondents mean to suggest that the case arises under 42 U.S.C. § 1983 (Brief of Federal Respondents, p. 57), they are incorrect.

coerced sexual intercourse", by a named Yale employee at unspecified times during her four years as an undergraduate, and that she had without success "attempted to complain" to university officials.

The second named plaintiff, a Yale undergraduate, alleged that during office conferences with a named member of the Yale faculty during the spring of 1977, she was "sexually harassed", and as a result "considered complaining" to Yale. When the accused faculty member sought to intervene for the purpose of defending his reputation against these allegations, plaintiffs responded by opposing the motion to intervene and contemporaneously filing an amended complaint in which plaintiffs withdrew all allegations by the second named plaintiff. The accused faculty member was left with no forum in which to refute accusations which were damaging to his personal and professional reputation and which had received, with plaintiffs' active participation, widespread publicity.

The third named plaintiff, a Yale undergraduate, alleged that her "best friend" was subjected to "sexual pressures and attentions" from a named Yale employee during the academic year 1974-1975.

The fourth named plaintiff, a recent Yale graduate, alleged that she had discussed with female undergraduates their complaints about the quality of education of women at Yale, including complaints of "sexual harassment", and that she had attempted without success to have Yale officials act on such complaints.

The fifth named plaintiff, a member of the Yale faculty, alleged that he had received from one of his students the hearsay account that another student had been subjected to "sexual harassment" by another Yale employee, and that he was affected because he was teaching in an atmosphere "poisoned by mistrust".

The sixth named plaintiff, a Yale undergraduate, claimed to have been embraced and kissed on one occasion by the coach of a Yale field hockey team of which she was the manager, and she alleged that she was unable to determine if any channels for complaint were available to her.

The seventh named plaintiff, a Yale senior, alleged that a grade of "C" which she had received in the spring of her sophomore year was not the result of a fair evaluation of her academic work, but was the result of her refusal to comply with the sexual demands of a named instructor. She alleged that after receiving her complaint, Yale refused to alter the disputed grade.

As the result of a motion filed by Yale within twenty days after commencement of the action, the claims of all except the last named plaintiff were, after several months and considerable publicity, dismissed for mootness or other failure to state a claim.

Shortly after dismissal of the other claims, the remaining plaintiff announced her intention to pursue class certification, and sought the disclosure of the details of every complaint of "sexual harassment" (defined to include any sexually suggestive remark made by a Yale employee to a female Yale student, regardless of the context or relationship to educational programs at Yale) during a period beginning three years prior to the enactment of Title IX.

The inappropriateness of judicial resolution of claims of this character underscores the error of ascribing to Congress the intent to create a private remedy. In *Alexander v. Yale*, even the threshold question whether there is a class of women students at Yale whose complaints of sexual harassment were inadequately processed by the university may require the District Court to review not only the procedure followed by Yale in each incident, but also the merits of the allegations underlying each complaint, for the adequacy of the relief afforded by the university to each

complainant depends ultimately on the merits of her complaint. And in the course of class certification it will require care to keep confidential both the identity of students who may have complained and the identity of any Yale employees who may have been accused.

On the other hand, an administrative agency such as HEW may, either as the result of a complaint or in the course of a compliance review, assess the adequacy of an institution's procedures. Through a process of conciliation the agency may seek changes in those procedures, without first having to resolve underlying controversies involving students and the institution or its employees.

The petitioner and several of the other *amici* claim that a private remedy is needed because HEW cannot afford individualized relief to the victims of discrimination. The judiciary, however, would be able to give the relief they seek only by placing under judicial supervision areas such as admissions and academic grading at private universities.¹⁷ Absent clear indication that Congress intended such a role for the judiciary, the Court should decline to infer one.

17. In *Regents of the University of California v. Bakke*, 98 S.Ct. 2733 (1978), the Courts were spared the task of determining whether Bakke would have been admitted to the Medical School of the University of California had the special admissions program not been in effect only because the University conceded its inability to demonstrate that he would not have been admitted. 98 S.Ct. at 2743. In the case *sub judice* the universities have made no such concessions. If Title IX provides a private right of action, the District Court will be placed in the role of admissions committee.

CONCLUSION

The decision and judgment of the Court of Appeals
should be affirmed.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON,
v. *Petitioner,*

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Respondents.

**On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit**

**MOTION TO SUBMIT BRIEF AS *AMICUS CURIAE*
AND BRIEF FOR THE EQUAL EMPLOYMENT
ADVISORY COUNCIL AS *AMICUS CURIAE***

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**MOTION OF THE EQUAL EMPLOYMENT
ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF
AS *AMICUS CURIAE***

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as *Amicus Curiae* supporting the respondents, The University of Chicago, et al, in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary non-profit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies and procedures to ensure nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Although most of EEAC's members are not directly subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, the Court's decision in this case—determining whether or not Title IX provides a private individual right to sue—can be expected to bear importantly on employers subject to other similar statutory provisions. Thus, many of EEAC's members participate in federally subsidized programs of various types and therefore are subject to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1975), a statute, which, like Title IX, was modeled after Title VI of the Civil Rights Act of 1974, 42 U.S.C. § 2000d, *et seq.* Furthermore, most of EEAC's members are also federal contractors subject to Section 503 of the

Rehabilitation Act, 29 U.S.C. § 793 (Supp. V 1975), a differently worded affirmative action statute for qualified handicapped workers which does not use the term "discrimination" and which expressly provides for an administrative remedy for noncompliance. EEAC's brief, set forth below, examines the issues presented in this Title IX case in their own legislative and statutory context, and further discusses the potential implications of this case for issues arising under the Rehabilitation Act.

3. For several reasons, EEAC feels it is important for this Court to be apprised of the relationship between the analogous implications of issues under Section 504 of the Rehabilitation Act (also modeled after Title VI to some degree) and this Title IX case:

The petitioner cited the similarity of language of three statutes, Title IX ("No person . . . shall be excluded"), Title VI ("No person shall be denied . . ."), and Section 504 ("No otherwise qualified handicapped individual . . . shall be excluded"), to establish the public importance of the private right of action issue as a reason for this Court to take certiorari jurisdiction over this case. (Cert. Pet. at 5) The Petitioner's brief cites a Section 504 case, *Lloyd v. RTA*, 548 F.2d 1277 (7th Cir. 1977), which was decided before the Department of Health, Education and Welfare had issued regulations under Section 504, in support of her argument that this Court should create a judicial remedy for injunctive relief and damages for unsuccessful student applicants, in addition to the administrative remedy provided by HEW's Title IX regulations and the available judicial review of HEW determinations. (Brief for

Pet. at 7 note 4) Petitioner admitted that there now exist identical enforcement provisions for Title IX and Section 504: both sets of HEW regulations "incorporate by reference the enforcement provisions for Title VI. 45 C.F.R. § 84.61 and 45 C.F.R. § 86.71." (*Id.*)

In addition, the *amicus* brief submitted in support of petitioner by the federally funded National Center for Law and the Handicapped, Inc. ("NCLH"), deals primarily with Section 504 issues. Both petitioner and respondents consented to the filing of that brief. (See NCLH Brief at 4).

Because petitioner relies on *Lloyd*, and because four members of this Court referred to *Lloyd* in the context of the discussion of Title VI in *Regents v. Bakke*, — U.S. —, 98 S.Ct. 2733, 2815 n. 27 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part), the EEAC believes that a fuller discussion of relevant Section 504 implication issues will be helpful to the Court in this case.

4. As set forth more fully in the accompanying brief, EEAC submits that neither Title IX or Section 504 provides a private judicial remedy; but should this Court imply any sort of nonstatutory remedy for an unsuccessful graduate school applicant under Title IX, the holding should be expressly limited to the facts of this case, to avoid opening the door to a barrage of lawsuits by rejected job applicants and employees under Title IX, Title VI, and Section 504. EEAC members are especially concerned that employers subject to comprehensive federal regulation under numerous statutes and executive orders (including universities in their capacities

as employers) not be suddenly confronted with massive potential liabilities in court actions lacking explicit Congressional authorization.

5. On several other occasions, EEAC sought and was granted permission by this Court to file briefs as *Amicus Curiae*. See, e.g., *Furnco Construction Corp. v. Waters*, — U.S. —, 46 U.S.L.W. 4966 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Gardner v. Westinghouse Broadcasting Company*, 46 U.S.L.W. 4761 (1978); and *Shell Oil Company v. Anne M. Dartt*, 434 U.S. 98 (1977).

6. The written consent of counsel for the respondents to the filing of this brief has been filed with the Clerk of the Court. Counsel for the petitioner indicated that he would not consent, thereby necessitating this motion.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON,
Petitioner,
v.

THE UNIVERSITY OF CHICAGO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

**BRIEF FOR THE EQUAL EMPLOYMENT
ADVISORY COUNCIL AS *AMICUS CURIAE***

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief *amicus curiae* in support of the Respondents, The University of Chicago, *et al.*

SUMMARY OF ARGUMENT

Title IX expressly provides for judicial review of administrative action in a suit against the agency. No additional judicial remedies should be implied by the courts, because the intent of Congress to preclude additional remedies is apparent from the carefully constructed remedial scheme of the statute. The leg-

islative history of Section 504 leads to the conclusion that access to court under both statutes is restricted to those who have obtained an adverse administrative ruling. An allegation in the complaint that a "personal civil right" is involved does not justify ignoring the procedures specified by Congress for vindicating that right.

If a right of action were implied under Section 504, the number of potential plaintiffs could be enormous and could include an indiscernible number of persons not presently defined in the statute. Although not all citizens are in fact handicapped individuals who are qualified for particular programs or jobs, many allegations to that effect would be likely to survive a motion to dismiss and necessitate voluminous discovery and lengthy trials. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The *Amicus Curiae* believes that such a staggering judicial expansion of federal jurisdiction must be precluded by a properly limited construction of the language which appears in both Title IX and Section 504.

If any nonstatutory right of action against private universities were implied from Title IX, it should be carefully limited to declaratory and injunctive relief subsequent to exhaustion of administrative remedies. Monetary remedies should not be available. The scope of the action should be limited to the particular programs receiving federal funds, and not allowed to encompass every activity of the entity which participates in the subsidized program. In particular, employment activities other than federally subsidized jobs programs are beyond the scope of Title IX or Section 504.

ARGUMENT

I. The Court should not imply an additional private judicial remedy under Title IX.

A. *Nothing in the legislative history of the Rehabilitation Act supports the implication of a right of action against private entities under Section 504 of that Act or under Title IX, but much supports the restriction of judicial participation in enforcement to a limited review of administrative proceedings in suits against the agency.*

The portions of Section 504's legislative history that were quoted extensively in *Lloyd v. RTA*, 548 F.2d 1277, 1285-86 (7th Cir. 1977), and mentioned in Mr. Justice Stevens' opinion in *Bakke*, 98 S.Ct. at 2815 n. 7, show that Congress intended the enforcement provisions for Section 504 to be patterned after the Title VI regulations, 45 C.F.R. Parts 80 and 81, which do not provide for or contemplate a private cause of action for alleged victims of discrimination against alleged violators. Senate Report No. 93-1297¹ includes the following sentence:

This approach to implementation of section 504, which closely follows the models of [Title VI and Title IX], would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of

¹ 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6791. This report is dated November 26, 1974. Proposed Title IX regulations had been published five months earlier, on June 20, 1974, 39 Fed. Reg. 22228, but were not issued in final form until June 4, 1975. 40 Fed. Reg. 24137.

implementation, and permit a judicial remedy through a private action.

Petitioner cites this last phrase and the *Lloyd* case in support of her argument that she may bypass Title IX's administrative procedures and sue a recipient of federal funds directly. But the *Lloyd* court expressly stated that "the above language contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court," 548 F.2d at 1248. The entire passage from the Senate Report is a directive to the Department of Health, Education and Welfare to enforce Section 504 as it was already enforcing Title VI and Title IX. If HEW should arbitrarily and capriciously abuse its enforcement powers, an aggrieved recipient of federal financial assistance would clearly be entitled to obtain judicial review of agency action, the "judicial remedy through a private action" contemplated by Congress. The defendant in such an action would be HEW, not the recipient of federal funds,² and review would be limited to the administrative record, to determine whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record

² The Administrative Procedure Act, 5 U.S.C. §§ 701-706, providing for judicial review of agency action, allows suits against agencies but not private parties. See, e.g., *Thomas v. DeVilbiss*, 408 F. Supp. 1357 (D. Ariz. 1973). Thus, persons alleging a failure of an agency to eradicate discrimination by the regulated entities must file suit against the agency, as in *NAACP v. Federal Power Comm.*, 425 U.S. 662 (1976), not against the regulatee. The courts have long recognized the "merit in confining [Title VI] litigation to the public agencies." *Taylor v. Cohen*, 405 F.2d 277, 283 (4th Cir. 1968).

as a whole. See *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

Petitioner's seizure upon this sole passage from the legislative history of Section 504 to buttress her argument that a private cause of action should be implied under Title IX highlights her complete inability to point to any evidence in Section 504's history of a Congressional intent to provide for the type of private suit for damages and injunctive relief against a private university which petitioner seeks to maintain under Title IX. That very passage, as the *Lloyd* panel recognized, though it pretermitted the issue as premature, can be read in no other way than to restrict the scope of judicial participation in Section 504 enforcement to a limited review of administrative proceedings. In other words, Congress intended to foreclose private litigation about alleged discrimination by educational institutions that participate in one or more federally subsidized programs until a final agency determination has been made. Because administrative procedures had not yet been established when *Lloyd* was handed down, the court allowed the suit to proceed against public transportation authorities whose actions otherwise would not have been reviewed by any tribunal, administrative or judicial. In contrast, the availability of both administrative review and limited judicial review of agency action under Title IX, 20 U.S.C. §§ 1682, 1683, precludes the implication of an additional private cause of action against the University of Chicago, particularly one for damages.

An intention to preclude such private suits must be deduced from the terms of Title IX itself according to the principle of statutory construction followed in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) (hereinafter "*Amtrak*"), that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." Title IX expressly provides for administrative enforcement and limited judicial review, 20 U.S.C. §§ 1682, 1683. Although Section 504 of the Rehabilitation Act does not include similar provisions, the very portion of the legislative history of Section 504 upon which petitioner relies contemplates the issuance of regulations like those under Title IX and Title VI. Because the Congressional directive for Section 504 is "mandatory in form, and such regulations and enforcement are intended,"³ Congress clearly did not intend to permit private suits against the recipients of federal funds.

As Mr. Justice Powell pointed out in *Bakke*,⁴ there are clear indications in Title VI's legislative history that Congress did not intend to create a private cause of action under that statute. Congress did not find it necessary to say more than it did in the legislative histories of Title VI and Title IX about its intention to foreclose additional judicial remedies because that intention is so plain from the provisions of both Titles that expressly provide particular ju-

³ S. Rep. No. 93-1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. CONG. CODE CONG. & AD. NEWS at 6390-91.

⁴ *Bakke*, 98 S.Ct. at 2745 n. 18.

dicial and administrative remedies, but omit from those remedies any rights for private individuals to sue recipients of federal funds.⁵ Similarly, the most plausible explanation for the lack of more detailed language foreclosing a judicial cause of action under Section 504 lies in the directive of Congress to HEW, in the Senate Report cited by the *Lloyd* court,⁶ to enforce Section 504 just as it had been enforcing Title IX and Title VI. Congress, which is surely aware of the long-standing⁷ principle of statutory construction restated in *Amtrak*, is entitled to assume that the judiciary will recognize the "balance, completeness, and structural integrity" of its statutes and abstain from interference with the "careful blend of administrative and judicial enforcement powers"⁸ contained in Title VI and in Title IX and incorporated by reference (in the Senate Report) into Section 504. This Court has never demanded that Congress insert into a statute or its legislative history a sentence to the effect that "no court shall imply any additional remedies hereunder" as a precondition to its refusal to "expand the coverage of the statute to subsume other remedies."⁹

⁵ "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Tennessee Valley Auth. v. Hill*, — U.S. —, 98 S.Ct. 2279, 2296 n. 29 (1978).

⁶ [1974] U.S. CODE CONG. & AD. NEWS at 6390-91.

⁷ See, e.g., *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929), the case cited in *Amtrak*.

⁸ See *Brown v. GSA*, 425 U.S. 820, 832-33 (1976).

⁹ *Amtrak*, *supra*, 414 U.S. at 458.

Even if legislative history were ambiguous about the intent of Congress to foreclose a private cause of action, the lack of evidence of an intent to create one, combined with provision of alternative remedies, should settle the issue against implication. However, the exact nature of the legislative history prong of the implication test announced in *Cort v. Ash*, 422 U.S. 66, 78 (1975), is unclear after the *Bakke* decision. Prior to *Bakke*, one could reasonably have assumed, as did the Fifth Circuit in *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 360 (5th Cir. 1977) (rejecting private cause of action under HUD Handbook and National Housing Act),¹⁰ that legislative silence on the private right of action issue was a strike against implication. If legislative silence or ambiguity is read the opposite way, as supporting the notion that Congress had no intention to foreclose a private right of action, then such decisions as *Cort* and *Amtrak* and *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975), would have to be overruled. The courts would be obliged to entertain an explosion of lawsuits in geometric proportion to the enormous growth of federal statutes and regulations. The better approach is to leave such an expansion of federal court jurisdiction to the explicit wisdom of Congress.

A recent student note and a student comment¹¹

¹⁰ In *Roberts* the Court required that there "be some indication of legislative intent to create such a remedy" before a private cause of action would be implied from a statute. *Id.* at 360.

¹¹ Note, "Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View," 87 Yale L.J. 1378 (1978);

attempt to distinguish *Cort*, *Amtrak*, and *Barbour* as non-civil rights cases, and suggest that private rights of action ought to be inferred under civil rights statutes as a matter of course. Such a simplistic approach would merely encourage artful attempts to characterize nearly every claim as a "civil right" in order to gain access to federal court. Most substantive rights created by federal statutes, including those created by the statutes in *Cort*, *Amtrak*, and *Barbour*, can easily be conceptualized as personal civil rights. Legal fictions aside, all statutory duties ultimately impinge on persons, and all statutory rights accrue to persons. Nonetheless, the sound principles of separation of powers which underlie this Court's refusals to interfere with Congressional legislative schemes by implying remedies Congress did not see fit to provide apply just as strongly to federal statutes which a plaintiff thinks create a "civil right" as to any other federal statutes.

Two of this Court's recent decisions reject the argument that federal courts must automatically hear alleged civil rights claims regardless of the lack of Congressional intention to create jurisdiction over the particular type of claim alleged. In *Morris v. Gressette*, 432 U.S. 491 (1977), the Court held that the Attorney General's failure to object to a reapportionment plan under § 5 of the Voting Rights Act is not subject to judicial review, despite the fact

Comment, "Private Rights of Action under Title IX," 1978 Harv. Civ. R.-Civ. Lib. L. Rev. (page proofs not yet available). Neither the note nor the comment even mentions the two cases which refute their thesis, *Morris v. Gressette*, 432 U.S. 491 (1977), and *Santa Clara Pueblo v. Martinez*, — U.S. —, 98 S.Ct. 1970 (1978), discussed *infra*.

that "no provision of the Voting Rights Act expressly precludes judicial review," *id.* at 501, and "there is no legislative history bearing directly on the issue," *id.* at 503, because "nonreviewability can fairly be inferred" within "the context of the entire legislative scheme." *Id.* at 501. This is the very portion of the Voting Rights Act under which a certain type of private cause of action had been inferred in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), a case relied on by petitioner and her supporting *amici*.

Likewise, in *Santa Clara Pueblo v. Martinez*, — U.S. —, 98 S.Ct. 1970 (1978), this Court declined to imply a private cause of action for sex and ancestry discrimination under Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1970), which declares in broad language establishing personal rights that no Indian tribe "in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*, § 1302(8). The Court's dispositive citation of *Amtrak* and *Cort* in the *Santa Clara Pueblo* case, 98 S.Ct. at 1670, obviously rejects the suggestion that the rationales and results of *Amtrak* and *Cort* apply only to non-civil rights cases. *Santa Clara Pueblo* also rebuffs the strange argument of the *amici* supporting petitioner to the effect that alleged personal rights of single individuals are somehow entitled to greater judicial solicitude at the threshold jurisdictional level than "public" rights of many persons being enforced collectively by an executive officer.

Thus, though this case involves an alleged "personal civil right" to be admitted to the medical school

of the University of Chicago, the concerns for judicial restraint which led to the *Cort*, *Amtrak*, and *Barbour* decisions likewise bar Ms. Cannon's attempt to sue the University of Chicago directly, rather than to await an HEW decision and, if it is adverse, to seek judicial review.

B. Implication of a private right of action under Title IX would interfere with the legislative purposes of the Education Amendments of 1972.

Petitioner takes the extreme position that because private suits will have the effect of eliminating discrimination, such suits must be consonant with the legislative purpose of Title IX. To make this argument, petitioner must redefine the legislative purpose in the abstract, without reference to the other portions of the Education Amendments of 1972 or even to the other portions of Title IX, particularly the means Congress designated in 20 U.S.C. § 1682 and § 1683 to implement § 1681.¹²

¹² It is somewhat misleading to insist or assume that female applicants to graduate schools participating in one or more subsidized programs are the intended beneficiaries of Title IX or that otherwise qualified handicapped individuals seeking to participate in a subsidized program are the intended beneficiaries of Section 504. Congress obviously had such groups in mind when it passed those statutes. But Congress bestowed a limited benefit upon them. The benefit explicitly conferred does not include the right for a disappointed student or a qualified handicapped individual to sue the recipient of federal funds. The benefit is limited to whatever the designated enforcement agency obtains on their behalf. Thus, the part of the *Cort v. Ash* test which inquires whether the plaintiff is a person for whose especial benefit the statute was passed must include consideration of the nature of the special benefit, if any, which has explicitly been provided. Petitioner merely begs this question when she states that she

It is important to view Title IX within "the context of the entire legislative scheme"¹³ of the Education Amendments of 1972.¹⁴ The purpose of the statute, an extensive piece of legislation occupying nearly 200 pages of the U.S. Code Congressional and Administrative News, was to improve the American education system by providing a massive infusion of federal funds into a myriad of programs, especially in higher education, and to produce the best graduates possible as a result of the federal expenditures. Because sex discrimination arbitrarily and irrationally eliminates some better qualified persons who happen to be female from the student rolls, it was prohibited insofar as the funded programs were concerned. However, the Amendments were primarily an appropriations law,¹⁵ and the major task assigned to the Department of Health, Education and Welfare, the federal agency with educational expertise, was to see that the appropriated

is "within the class for whose *especial* benefit Title IX was enacted." (Cert. Pet. at 12) *See, e.g., United States v. Lovknit Mfg. Co.*, 189 F.2d 454 (5th Cir.), *cert. denied*, 432 U.S. 896 (1951) (no implied private right for employee to sue federal contractor for failure to comply with wage-hour provisions of Walsh-Healey Act, 41 U.S.C. §§ 35-45, because action by Attorney General to recover underpaid amounts on behalf of employees is the only relief Congress provided).

¹³ *Morris v. Gressette*, *supra*, 432 U.S. at 501, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

¹⁴ Public Law 92-318, 86 Stat. 235, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 278.

¹⁵ Likewise, the Rehabilitation Act of 1973 was primarily a spending bill to develop new programs to assist the handicapped.

funds were spent for the intended purposes. To accomplish that task, HEW was to ensure that educational standards would be maintained and, it was hoped, at the same time, to make certain that the standards were not used to exclude female applicants to graduate schools because of their sex. Thus, the enforcement of Title IX was committed not to the federal courts but to HEW, which Congress presumed to have the expertise to remove any inherent sexual bias from scholastic standards for graduate school admissions, grading, and other practices without impairing valid educational requirements or impinging on academic freedoms.¹⁶

The Court must consider not only the Education Amendments of 1972 as a whole, but also Title IX as a whole, instead of focusing only on § 1681. The carefully constructed legislative scheme of Title IX is to attack sex discrimination in the distribution of federal funds through certain administrative and judicial procedures. The argument that Congress intended to root out sex discrimination by any and all conceivable means not only is belied by the bal-

¹⁶ The relative lack of expertise in the courts for weighing academic qualifications or performance has been noted in the related context of employment discrimination cases involving faculty members brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which provides an express private remedy. *See e.g., Green v. Board of Regents of Texas Tech Univ.*, 335 F. Supp. 249 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594 (5th Cir. 1973); *Faro v. New York Univ.*, 502 F.2d 1229, 1231-2 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision").

ance, completeness, and structural integrity of Title IX, but also would compel the conclusion that there is an implied private right of action under every obligatory or prohibitory federal statute. That argument flies in the face of this Court's decisions in *Amtrak*, *Cort*, *Barbour*, *Morris*, and *Santa Clara Pueblo*, *supra*.

The Seventh Circuit below captured the essence of the fallacy in petitioner's argument by observing:

Such an argument goes too far, for implication of a private right to enforce every federal statute would have the same effect of assisting agency efforts to obtain compliance with federal policies. Simply put, the argument begs the question of whether implication of a private judicial remedy is consistent with the purposes of a legislative scheme that gives responsibility for enforcing its statutory policies to an administrative agency rather than to "private attorneys general." We think it clear from the face of the statute and the regulations promulgated pursuant thereto that, in providing private parties with an administrative but not a judicial forum in which to raise complaints of sex discrimination, it was Congress's purpose to commit the screening of Title IX complaints to the administrative agencies charged with the responsibility of overseeing federally funded educational programs and to encourage resolution of those complaints by means of agency conciliation efforts directed at achieving voluntary compliance with the statutory prohibition. Those purposes would not be served by implying a statutory cause of action that would permit private parties to circumvent the remedial scheme created by Congress.

599 F.2d at 1081.

The legislative purpose of Section 504 is likewise better served by agency enforcement (and judicial review of agency action) than by private suits. "Handicap discrimination" is a relatively new concept whose meaning is still unclear not only to those being accused of it, but also to the agency charged with rooting it out of various federally subsidized programs." Former HEW Secretary Mathews explained the unique definitional problems in this area in a letter accompanying the publication of the initial version of the proposed Section 504 regulations:

Section 504 [of the Rehabilitation Act of 1973, 29 U.S.C. § 794], however, differs conceptually from both titles VI [of the Civil Rights Act of 1964] and IX [of the Education Amendments of 1972]. The premise of both title VI and title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal

¹⁷ The confusion was so troubling that on January 18, 1977, former HEW Secretary Mathews declined to sign the proposed § 504 regulations drafted by his agency and instead sent them back to Congress under cover of a letter to Congressman John Brademas which complained of "difficulty of reconstructing the intent of Congress," especially with respect to coverage of drug addicts and alcoholics. Secretary Califano signed the regulations, however, on April 28, 1977. *Cf. Florey v. Line Pilots Assoc., Int.*, 439 F. Supp. 165, 172 (D. Minn. 1977) (rejecting private cause of action for alcoholics).

access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504 questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required.¹⁸

Not only is the limited prohibition of handicap discrimination against "otherwise qualified" individuals new, but the very substantive concept is novel and raises difficult problems of application. Handicaps differ widely in kind and degree, and there is no readily identifiable and homogeneous class of handicapped persons. Nor is there a class of non-handicapped persons with whom treatment of handicapped persons can be compared. The Rehabilitation Act's definition of the handicapped, 29 U.S.C. § 701(6) (Supp. V 1975), is so broad that discrimination would have to be defined in terms of disparate treatment of differently and uniquely handicapped individuals. This analysis becomes hopelessly complex because there is no fixed reference class with which treatment of others can be compared.

Notwithstanding that Congress chose to use the same term "discrimination" which has proven effective in the social assault on racism and sexism, the very fact that Congress limited the application of Section 504 to "otherwise qualified handicapped indi-

¹⁸ 41 Fed. Reg. at 20,296 (1976).

viduals" who face disparate treatment "solely" on the basis of handicap shows the caution of Congress in this new area. Furthermore, Congress has consistently rejected the perennial attempts to amend Title VII, which does include an explicit private right of action, 42 U.S.C. § 2000e-5(g), to add handicap as a prohibited ground of discrimination.¹⁹ The only reasonable inference from the face of the Rehabilitation Act and its legislative history is that Congress, in its initial foray into an uncharted field, declined to provide private rights of action because it wanted a specialized agency to explore the field to determine which efforts to improve the opportunities for handicapped individuals are most appropriate.²⁰

¹⁹ See Exhibit "A" hereto, and *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977), *appeal pending*, No. 77-2443 (5th Cir.) (no implied private right of action under Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which does not use the term "discrimination" but merely requires federal contractors to take affirmative action to employ and advance in employment qualified handicapped individuals). Accord, *Wood v. Diamond State Telephone Co.*, 440 F. Supp. 1003 (D. Del. 1977); *Moon v. Roadway Express*, 439 F. Supp. 1308 (N.D. Ga. 1977), *appeal pending*, No. 77-3263 (5th Cir.). Employment issues are discussed in more detail in Section III(A) of this brief, *infra*.

²⁰ At the very least, the legislative purposes of both Section 504 and Title IX require resort to administrative remedies prior to the filing of any court action. Thus, the courts have often dismissed Title VI suits for failure to exhaust administrative remedies. See, e.g., *Green Street Ass'n v. Daley*, 373 F.2d 1, 8-9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967); *Green v. Cauthen*, 379 F. Supp. 361, 378 (D.S.C. 1974); *Feliciano v. Romney*, 363 F. Supp. 656, 672-73 (S.D.N.Y. 1973); *Dupree v. City of Chattanooga*, 362 F. Supp. 1136, 1141-42 (E.D. Tenn. 1973). Since HEW's administrative

II. Any implied judicial remedy under Title IX should be carefully circumscribed.

A. Title IX covers only the programs receiving federal financial assistance, not every activity administered by the institution participating in the subsidized program.

Title VI, the statute at issue in *Lau v. Nichols*, 414 U.S. 563 (1974), explicitly excludes employment practices of recipients of federal grants from coverage except in federally-subsidized jobs programs. 42 U.S.C. § 2000d-3 (1970); see *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 882-83 (5th Cir. 1966), *decree corrected on rehearing*, 380 F.2d 385 (en banc), *cert. denied*, 389 U.S. 840 (1967). Nonetheless, the Department of Health, Education and Welfare has taken the position that it has jurisdiction under Title IX and Section 504 not only over programs receiving federal aid, but also all other activities, including employment practices unrelated to the federally assisted activity. 45 C.F.R. §§ 86.51-86.61 (Title IX); 45 C.F.R. §§ 84.11-84.14 (Section 504).

Five federal district courts, after exhaustive analyses of legislative history, have now held that Title IX, like Title VI, only reaches discrimination affecting the direct beneficiaries of federal assistance and does not cover collateral employment practices, and that HEW lacked authority to issue the regulations purporting to deal with employment practices. *Brunswick School Board v. Califano*, 449 F.Supp. 866 (D.

remedies under Title IX are identical to those of Title VI, the same principle requires dismissal of the present action. See Section III(C), *infra*.

Me. 1978); *Romeo Community Schools v. HEW*, 438 F.Supp. 1021 (E.D. Mich. 1977), *appeal pending*, No. 77-1691 (6th Cir.); *Seattle University v. HEW*, — F.Supp. —, 16 E.P.D. ¶ 8241 (W.D. Wash. 1978); *McCarthy v. Burkholder*, 448 F.Supp. 41 (D. Kan. 1978); *Junior College District of St. Louis v. Califano*, 18 F.E.P. Cases 88 (E.D. Mo. 1978). See Kuhn, "Title IX: Employment and Athletics are Outside HEW's Jurisdiction," 65 Geo. L.J. 49 (1976).

Likewise, the legislative history of Section 504 reveals that this statute was not intended by Congress to cover employment practices other than federally funded job programs. Section 504 was added to the Rehabilitation Act because of the failure of proposed amendments to Title VI to add coverage for the handicapped.²¹ Congressman Vanik stated that the purpose of the rejected Title VI amendments was to cover education and vocational training,²² and later indicated his satisfaction that Section 504 had incorporated his proposal.²³ Thus, the only impact Section 504 was to have on employment was in the area of subsidized vocational training. See Note, "Equal Employment of the Disabled: A Proposal," 10 Colum. J.L. & Soc. Prob. 457, 468 (1974).

The Equal Employment Advisory Council submits that if any sort of private right of action is implied

²¹ H.R. 12,154, 92d Cong., 1st Sess. (1971); H.R. 13,947, 92 Cong., 2d Sess. (1972).

²² See, e.g., 117 Cong. Rec. 45,974 (1971) (remarks of Representative Vanik).

²³ 119 Cong. Rec. H4,294 (daily ed. June 5, 1973) (remarks of Representative Vanik).

for unsuccessful students under Title IX, the exact nature and scope of the implied remedy should be carefully circumscribed. The Court should make it plain that Title IX covers only the specific programs receiving federal aid, not other activities of institutions which administer the subsidized program.

Regulation of one such other activity, employment practices, is an area in which the courts have been particularly adverse to the implication of private judicial remedies under federal statutes and executive orders.²⁴ The prospect of judicially created employ-

²⁴ See, e.g., the cases collected in *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 202 n. 1 (N.D. Tex. 1977) (no private right of action under Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793). Cases denying implication of private causes of action for employees under various federal statutes include *Olson v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977) (Outer Continental Shelf Lands Act); *Marshall v. Daniels Constr. Co.*, 563 F.2d 707 (5th Cir. 1977), cert. denied, 47 U.S.L.W. 3210 (1978) (Secretary of Labor may not enforce an alleged implied private right under Occupational Health and Safety Act of 1970 for employee to refuse to work when confronted with dangerous condition); *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975) (Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678); *Martinez v. Behring's Bearings Serv., Inc.*, 501 F.2d 104 (5th Cir. 1974) [antidiscrimination provisions of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3)]; *Flores v. George Braun Packing Co.*, 482 F.2d 279 (5th Cir. 1973) [Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(A)(ii), 1182(a)(14), 1324]; *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890 (10th Cir.), cert. denied, 409 U.S. 1042 (1972) (same); *Hines v. Cenla Community Action Comm., Inc.*, 474 F.2d 1052 (5th Cir. 1973) (Economic Opportunity Act, 42 U.S.C. § 2796); *Breitwieser v. KMS Indus., Inc.*, 467 F.2d 1391 (5th Cir. 1972), cert. denied, 410 U.S. 969 (1973) (child labor provisions of Fair Labor Standards Act, 29 U.S.C. § 212); *Farkas*

ment litigation under the Rehabilitation Act is particularly unappealing. Such litigation would present, in the words of the court in *Lloyd v. RTA, supra*, 548 F.2d at 1286, "the unseemly vista of a spotty application of *ad hoc* remedies in lawsuits in various regions of the country." Private lawsuits for reinstatement and back pay against private employers, whether or not alleged as class actions,²⁵ would necessitate numerous individual determinations concerning degree of handicap and ability to perform particular jobs efficiently. Because handicaps, unlike most other potential grounds for discrimination, "differ widely in nature and degree of severity," 41 Fed. Reg. 29,548 (1976), alleged class actions would lack common, predominant questions of fact or law, would include atypical and potentially conflicting claims, would not provide a superior method of adjudication of all claims, and would be inherently unmanageable. See Fed. R. Civ. P. 23(a), 23(b)(3).²⁶ It is no wonder

v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977 (1967) (Exec. Order No. 10,925, the predecessor of Exec. Order No. 11,246); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964), (same); *United States v. Lovknit Mfg. Co.*, 189 F.2d 454 (5th Cir. 1951) (Walsh-Healey Act, 41 U.S.C. §§ 35-45).

²⁵ The implication issue should not turn on whether or not a class action is alleged. A rule allowing class actions but not individual ones would encourage the inclusion of frivolous class allegations in every complaint.

²⁶ In *Webb v. Miami Valley Regional Transit Auth.*, Civil Action No. C-3-75-67 (S.D. Ohio, dismissed Jan. 19, 1976), the court held that the alleged class of handicapped and elderly persons was "so nebulous and so diverse as to defy attempts to ascertain its limits. As such, this Court cannot

that Congress has repeatedly refused to amend Title VII to add handicap as an additional prohibited ground of discrimination.²⁷

B. There is no private right to sue for monetary damages.

The petitioner's prayer for monetary damages in her complaint raises the additional issue, which must be reached only if an additional nonstatutory remedy is implied under Title IX, of whether the remedy includes, for example, damages for loss of income or mental distress or (in the employment context) back pay.²⁸ Even if some private cause of action were implied under either Title IX or Section 504, monetary

find that there are questions of law or fact common to the class or that the claims or defenses of the representative parties are typical of the claims or defenses of the class."

²⁷ See Exhibit "A" to this brief. In the Age Discrimination Act, in which Congress explicitly provided for private suits, Congress also recognized the individualized nature of the determinations to be made thereunder, and placed a severe restriction on the scope of multi-plaintiff actions by the "opt-in" provision in the Act. 29 U.S.C. § 626(b) (1970); see Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 381 n. 10 (1976).

²⁸ The petitioner in the *Bakke* case (Title VI) sought only declaratory and injunctive relief, not damages. Likewise, *Lloyd v. RTA* (Section 504) allowed a suit only for declaratory and injunctive relief against a public transportation authority, in the absence of administrative procedures to seek review of the authority's actions.

The court held in *Rendon v. Utah Job Service*, 17 F.E.P. Cases 1250 (D. Utah 1978), that monetary damages are not available under Title VI. The Eighth Circuit pretermitted the issue in *Chambers v. Omaha Public School Dist.*, 536 F.2d 222, 225 n. 2 (8th Cir. 1976).

remedies should not be provided. The legislative history of neither Title IX nor Section 504 gives any support whatsoever to the notion that monetary remedies should be available to private litigants against institutions which participate in federally funded programs. To the contrary, the repeated refusals of Congress to amend Title VII to cover the handicapped evince an intent to preclude such remedies under Section 504. Because Congress has consistently refused to extend to qualified handicapped individuals the back pay remedies under Title VII's explicit remedial provision, 42 U.S.C. § 2000e-5(g), it would be anomalous for the judiciary to authorize recovery of back pay or other types of monetary relief under Section 504.

Unlike 42 U.S.C. § 1983, which explicitly provides for private liability "in an action at law, suit in equity, or other proper proceeding for redress" and thus has been held to create "a species of tort liability," see *Carey v. Piphus*, 435 U.S. 247, 253 (1978), neither Title IX nor Section 504 does anything comparable, either explicitly or implicitly. The effects of the implication of a private right to bypass the administrative procedures under these statutes and sue a private university directly for injunctive or declaratory relief—as unwarranted as it would be to permit such litigation—nevertheless pale by comparison to the impact that implication of a monetary remedy would have on the financial resources of colleges, universities, and other entities that participate in one or more federally funded programs. The judicial restraint demonstrated in *City of Los Angeles v. Manhart*, — U.S. —, 98 S.Ct. 1370, 1380-83 (1978), in denying back pay liability in a Title VII sex dis-

crimination case because of the massive unanticipated burden this would impose on employers, even pursuant to a statute that explicitly authorized back pay awards in the discretion of the court, should apply much more strongly where the cause of action itself is being implied by the courts without explicit Congressional authorization. Thus, any implied right of action under Title IX or Section 504 should be limited to declaratory or injunctive relief.²⁰

The Court, of course, will not necessarily reach the issues discussed in this section. Nonetheless, the decision to imply or not to imply a private right of action under a particular federal statute is primarily a matter of sound public policy (absent dispositive Congressional direction), and the policy issues under Title IX, Title VI, and Section 504 are so intertwined that the *Amicus* believes the Court should take full account of the size of the reservoir when it considers whether to open a sluice gate for this petitioner.

²⁰ Enforcement of Section 504 through private suits could impose massive cost burdens on employers and other recipients of federal funds. For example, the "reasonableness accommodation" provision of the Section 504 regulations, 45 C.F.R. § 84.12, which purports to apply to the employment practices of participants in federally funded programs, could entail large economic costs, unless construed by the courts to require no more than *de minimus* expenditures on behalf of handicapped individuals, cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Likewise, private suits to require "affirmative conduct" (expenditures on behalf of handicapped individuals which are not made for nonhandicapped individuals) under Section 504, "even when such modifications become expensive," see *Davis v. Southeastern Community College*, 574 F.2d 1158, 1162 (4th Cir. 1978), could threaten the solvency of many colleges and universities.

C. A claimant must exhaust administrative remedies before filing suit in federal court.

It has long been established that no one can bring any kind of suit under Title VI, the model statute for Title IX and Section 504, without exhausting administrative remedies under 42 U.S.C. § 2000d-2. *Green Street Association v. Daley*, 373 F.2d 1, 8-9 (7th Cir.), cert. denied, 387 U.S. 932 (1967); *Cave v. Beame*, 433 F.Supp. 172, 174 (E.D.N.Y. 1977); *Johnson v. County of Chester*, 413 F.Supp. 1299, 1310-11 (E.D. Pa. 1976); *Green v. Cauthen*, 379 F.Supp. 361, 378 (D.S.C. 1974); *Feliciano v. Romney*, 363 F.Supp. 656, 672-73 (S.D.N.Y. 1973); *Dupree v. City of Chattanooga*, 362 F.Supp. 1136, 1141-42 (E.D. Tenn. 1973). The Title VI exhaustion requirement applies alike to alleged victims of discrimination, as in the cases above, and to alleged violators of the statute, as in *School Dist. of City of Saginaw, Michigan v. HEW*, 431 F.Supp. 147 (E.D. Mich. 1977).

Furthermore, a complainant must *fully* exhaust administrative remedies; it is not sufficient to allege, as Ms. Cannon has done in the present case, that she has filed a complaint with HEW. As this Court held in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767-68 (1947):

The doctrine [of exhaustion of administrative remedies], wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision. [note omitted]

More recently, in *McGee v. United States*, 402 U.S. 479, 484-85 (1971) (exhaustion requirement not satisfied), and *McKart v. United States*, 395 U.S. 185 (1969) (requirement satisfied), the policies underlying the doctrine were further explained. These policies were summarized in *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975):

Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an oppor-

tunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

This Court always applies the doctrine "with a regard for the particular administrative scheme at issue."³⁰ (*Id.*)

The statutory schemes for Title IX, Title VI, and Section 504 not only contain a "careful blend of administrative and judicial enforcement powers," see *Brown v. GSA*, *supra*, 425 U.S. at 832-33, but also take account, in the case of federally subsidized educational institutions, of the need for an initial determination by an agency with expertise in evaluating scholastic standards for a wide range of graduate school studies and in dealing with delicate issues of academic freedom. Hence, before judicial review can be undertaken, there must be a *final* agency determination about both the existence of discrimination and any necessary remedy.

The need for agency investigation and determinations is even more compelling in the new field of handicap discrimination under Section 504 of the Rehabilitation Act. As former HEW Secretary Matthews stressed, handicap discrimination is "far more complex" than the discrimination prohibited by Title VI and Title IX.³¹ As the agency which has long

³⁰ The doctrine of exhaustion of remedies applies to constitutional as well as statutory civil rights claims. See, e.g., *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 675 (N.D. Ga.) (3-judge court), *aff'd* 409 U.S. 1070 (1972); *Torres v. Taylor*, 47 U.S.L.W. 2147 (S.D.N.Y. 1978).

³¹ 41 Fed. Reg. at 20,296; see Section II(B), *supra*.

been administering programs for the rehabilitation of handicapped individuals, HEW is better equipped than the federal courts to make the initial investigations of complex factual situations and to formulate a consistent approach to handicap discrimination problems. Thus, exhaustion of administrative remedies should be required under Section 504 as well, with judicial review limited to such questions as whether HEW exceeded its statutory authority or abused its discretion.

III. Conclusion

This case presents a clear opportunity for the Court to reaffirm its commitment in *Cort* and *Amtrak* to leave major public policy decisions about the scope of federal jurisdiction to the wisdom of Congress. The Equal Employment Advisory Council therefore urges that the decisions of the trial court and the Court of Appeals be affirmed.

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EXHIBIT A

Unsuccessful Attempts to Amend the Civil Rights Act of 1964
to Add Handicap as a Prohibited Ground of Discrimination

93d Congress (1973-74)

Bill	Sponsor
S. 1780	Pell
H.R. 1120	Roybal
H.R. 2685	Hicks
H.R. 10960	Tiernan
H.R. 11986	Hicks & 24 others
H.R. 11987	Hicks & 10 others
H.R. 12654	O'Brien
H.R. 12916	Moakley
H.R. 13199	Hicks & 21 others
H.R. 13200	Hicks & 18 others

94th Congress (1975-76)

Bill	Sponsor
S. 1311	Pell
S. 1757	Weicker
H.R. 1346	O'Brien
H.R. 1886	Matsunaga
H.R. 2515	Hicks
H.R. 3497	Roybal
H.R. 4624	Hicks & 23 others
H.R. 4625	Hicks & 24 others
H.R. 4626	Hicks & 6 others
H.R. 5016	Hicks & 8 others
H.R. 7061	Dodd
H.R. 7754	Hicks & 3 others
H.R. 7758	Lehman
H.R. 7946	Dodd & 4 others
H.R. 8028	Beard & 19 others
H.R. 8417	Beard & 5 others
H.R. 12591	Koch

95th Congress (1977-78)

Bill	Sponsor
H.R. 264	Conte
H.R. 461	Le Fante
H.R. 1107	O'Brien
H.R. 1200	Rodino
H.R. 1995	Roybal
H.R. 3504	Edwards